EDITOR'S NOTE

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84-6811

No. 84-___

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

WARREN McCLESKEY,

Petitioner,

-against-

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JULIUS L. CHAMBERS
JAMES M. NABRIT, III
* JOHN CHARLES BOGER
DEVAL L. PATRICK
99 Hudson Street
New York, New York 10013
(212) 219-1900

ROBERT H. STROUP
1515 Healey Building
Atlanta, Georgia 30303

TIMOTHY K. FORD
600 Pioneer Building
Seattle, Washington 98104

ANTHONY G. AMSTERDAM
New York University
School of Law
40 Washington Square South
New York, New York 10012

* COUNSEL OF RECORD

ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

1. Is proof of specific intent or motive to discriminate a necessary element of an Eighth Amendment claim that a State has applied its capital statutes in an arbitrary, capricious, and discriminatory pattern?

2. To make out a *prima facie* case under the Fourteenth Amendment, must a capital inmate alleging discrimination in a State's application of its capital statutes present statistical evidence "so strong as to permit no inference other than that the results are a product of racially discriminatory intent or purpose?"

3. Does a proven disparity in the imposition of capital sentences, reflecting a systematic bias of death-sentencing outcomes against black defendants and those whose victims are white, offend the Eighth and Fourteenth Amendments irrespective of its magnitude?

4. Does a 20-point racial disparity in death-sentencing rates among that class of cases in which a death sentence is a serious possibility so undermine the evenhandedness of a capital sentencing system as to violate the Eighth or Fourteenth Amendment rights of a death-sentenced black defendant in that class of cases?

5. Must a capital defendant proffer evidence sufficient to prove that he was personally discriminated against because of his race in order to obtain an evidentiary hearing on allegations that he has been subjected to a State death-sentencing statute administered in an arbitrary or racially discriminatory manner?

6. Does the prosecution's failure to correct or reveal the false testimony of a key State's witness regarding an "informal" promise of favorable treatment made to the witness by a police detective violate the due process principles of Giglio v. United States? If so, can such a violation be harmless error when no other evidence informed the jury of the witness' motivation to testify favorably for the State?

7. Was the trial court's instruction to the jury on the element of intent -- an instruction virtually identical to the one condemned in Francis v. Franklin, ____ U.S. ____, 53 U.S.L.W. 4495 (U.S. April 30, 1985) -- harmless error beyond a reasonable doubt?

8. Did the State's exclusion for cause of two prospective jurors who could fairly have determined petitioner's guilt or innocence, solely because their attitudes toward capital punishment would have prevented them from serving fairly at the penalty phase, violate petitioner's Sixth, Eighth or Fourteenth Amendment rights to an impartial jury and to a jury selected from a representative cross-section of the community?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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TO THE UNITED STATES COURT OF APPEALS
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Petitioner Warren McCleskey respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

CITATIONS TO OPINIONS BELOW

The majority, concurring, and dissenting opinions in the United States Court of Appeals for the Eleventh Circuit en banc, which are officially reported at 753 F.2d 877 (11th Cir. 1985), are annexed as Appendix A.

The opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, which is officially reported at 580 F. Supp. 338 (N.D. Ga. 1984), is annexed as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1985. A timely motion for rehearing was denied on March 26,

1985. A copy of the order denying rehearing is annexed as Appendix C. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury;

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or [shall] cruel and unusual punishments [be] inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The case also involves the following statutory provisions, the texts of which are set forth in Appendix D: Former Ga. Code Ann. §§ 26-603; 26-604; 26-1101; 59-806(4); 59-807.

STATEMENT OF THE CASE

A. Racial Discrimination and Arbitrariness

1. The Historical Setting

For the first two hundred and fifty years of our colonial and national experience, black persons, as Chief Justice Taney confessed in the Dred Scott case, were "regarded as being of an inferior order; and altogether unfit to associate with the white

race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to accept ... This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion." Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857).

This radical judgment about the relative worth of black and white lives found its way deep into the fabric, not only of the national mind, but of the criminal law. Well before the Civil War, mos t of the Southern States had promulgated separate "slave codes" that harshly regulated the criminal and civil conduct of black persons.[1] Although the colony of Georgia, for example, initially banned the importation of blacks and forbade their use

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[1] See generally J. Hurd, The Law of Freedom and Bondage in the United States (Vol. I, 1858; Vol. II, 1862). See also K. Stampp, The Peculiar Institution: Slavery in the Ante-Bellum South 206-31 (1956). Id. at 210:

> State criminal codes dealt more severely with slaves and free Negroes than with whites. In the first place, they made certain acts felonies when committed by Negroes but not when committed by whites; and in the second place, they assigned heavier penalties to Negroes than whites convicted of the same offense. Every southern state defined a substantial number of felonies carrying capital punishment for slaves and lesser punishments for whites. In addition to murder of any degree, slaves received the death penalty for attempted murder, manslaughter, rape and attempted rape upon a white woman, rebellion and attempted rebellion, poisoning, robbery, and arson. A battery upon a white person might also carry a sentence of death under certain circumstances.

Id. at 210.

as slaves,[2] it had by 1750 accepted slavery as an institution;[3] and by the time of the Civil War it had adopted penal laws that prescribed different sanctions for criminal offenders depending upon their race and the race of their victim:

> For instance, conviction of raping a white woman, which meant a prison sentence of two to twenty years for a white offender, carried a mandatory death penalty for Negro offenders. Even attempted rape of a white woman by a black man could be punished with death, at the discretion of the court. On the other hand, rape of a slave or a free Negro by a white man was punishable 'by fine and imprisonment, at the discretion of the court.'[4]

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[2] 1 Colonial Records of Georgia (A. Candler, ed.) 49-52 (1904), cited in A.L. Higginbotham, Jr., In The Matter Of Color: Race & The American Legal Process: The Colonial Period 216-27, 439 n.2 (1978).

[3] 1 Colonial Records of Georgia 56-62 (A. Chandler, ed. 1904).

[4] D. Fehrenbacher, The Dred Scott Case: Its Significance in American Law & Politics 31 (1978). See generally The Code of the State of Georgia (R. Clark, T. Cobb & D. Irwin, compilers 1861). Professor Fehrenbacher notes that murder of a slave by a white was, throughout this period, subject to relatively minor punishment under most state statutes:

> Under colonial law, the killing of a slave in the course of chastisement or in a fit of passion was a minor offense at most and seldom punished. Even for willful, malicious homicide the prescribed penalty was ordinarily no more than a fine. Beginning with a North Carolina Law of 1774, all of the slaveholding states eventually imposed death as the punishment for deliberate murder of a slave. ... Non-fatal abuse of slaves was occasionally punished under the common law of the general criminal code, and by the 1850s most states provided statutory protection of some kind. The Georgia Code of 1861, for instance, defined excessive whipping and various other cruelties as misdemeanors, punishable by fine or imprisonment at the discretion of the court....

Fehrenacher, supra, note 4 at 34-35.

These racial distinctions could work to the advantage of black defendants, so long as their victims were also black. As Professor Stampp explains "[a] slave accused of committing violence upon another slave, rather than upon a white, had a better chance for a fair trial. Here the deeper issues of discipline and racial subordination were not involved, and the court could hear the case calmly and decide it on its merits. Moreover, the penalty on conviction was usually relatively light. Slaves were capitally punished for the murder of other slaves almost as rarely as whites were capitally punished for the murder of slaves."[5]

One obvious aim of the national government in the Civil War, articulated in the Emancipation Proclamation[6] and subsequently embodied in the Thirteenth Amendment,[7] was to end the legal subordination of blacks in slavery. Yet the close of the Civil War brought no immediate halt to the widespread Southern pattern of disregard for black life,[8] or to the disparity in legal

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[5] K. Stampp, supra note 1, at 227.

[6] 12 Stat. 1267, Jan. 1, 1863. See J. Franklin, The Emancipation Proclamation (1963).

[7] Slaughter House Cases, 83 U.S. (16 Wall.) 36, 67-69 (1873). See 1 B. Schwartz, Statutory History of the United States -- Civil Rights 25-96 (1960).

[8] After his exhaustive review of contemporary news accounts, diaries, and other primary Reconstruction sources, Professor Leon Litwack summarizes his findings on extra-legal violence as follows:

> How many black men and woman were beaten, flogged, mutilated and murdered in the first year of emancipation will never be known. ... Reporting on 'outrages' committed in Kentucky, a [Freedmen's] Bureau official confined himself to several counties and only to those cases in which he had sworn testimony, the names of the injured, the names of the alleged offenders, and the dates and localities.
>
> 'I have classified these outrages as follows: Twenty-three cases of severe and inhuman beating and whipping of men; four of beating and shooting; two of robbing and shooting; three of robbing; five men shot and killed; two shot and

treatment of those black and white defendants actually brought before the courts. The persisting disparity resulted both from a practical inability to sentence whites for crimes against blacks[9]

> wounded; four beaten to death; one beaten and roasted; three women assaulted and ravished; four women beaten; two women tied up and whipped until insensible; two men and their families beaten and driven from their homes, and their property destroyed; two instances of burning of dwellings, and one of the inmates shot.'
>
> Because of the difficulty in obtaining evidence and testimony, the officer stressed that his report included only a portion of the crimes against freedmen. 'White men, however friendly to the freedmen, dislike to make depositions in those cases for fear of personal violence. The same reason influences the black -- he is fearful, timid and trembling. He knows that since he has been a freedman he has not, up to this time, had the protection of either the federal or state authorities; that there is no way to enforce his rights or redress his wrongs."

L. Litwack, Been In The Storm So Long: The Aftermath Of Slavery 276-77 (1979) quoting 3 Report of the Joint Committee on Reconstruction, 39 Cong., 1st Sess., Part III, at 146 (1867).

[9] Professor Litwack observes that "the infrequency with which whites were apprehended, tried and convicted of crimes against freedmen made a mockery of equal justice." L. Litwack, supra note 8, at 285. Moreover, the disparate penal sanctions imposed against those few whites who were apprehended for interracial crime were in some ways the most striking feature of the post-war criminal justice system:

> The double standard of white justice was nowhere clearer, in fact, than in the disparate punishments meted out to whites and blacks convicted of similar crimes ...: [A] Freedmen's Bureau officer in Georgia despaired of any early or mass conversion to [the] ... principle ... that killing a black person amounted to murder ... 'The best men in the State admit that no jury would convict a white man for killing a freedman, or fail to hang a negro who had killed a white man in self defense.'

L. Litwack, supra note 8, 285-86.

and from the operation of statutes that explicitly made the severity of punishment dependent upon racial factors. Indeed, shortly after the war, harsh "Black Codes" were enacted by Georgia and other Southern states that retained traditional differences in punishment for crimes based upon the race of the defendant and the race of the victim.[10]

It was in large measure this resurgence of both lawlessness and legally sanctioned discriminatory treatment of blacks throughout the South that led to the enactment of the Civil Rights Act of 1866[11] and, ultimately, the Fourteenth Amendment.[12] This Court has since recognized that one principal goal of the Fourteenth Amendment was to prohibit differential treatment under State penal law:

> The 14th Amendment was framed and adopted ... to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the General Government, in that enjoyment whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State power to

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[10] Slaughter House Cases, supra, 83 U.S. (16 Wall.) at 70-71. See generally T. Wilson, The Black Codes of the South (1965); F. Johnson, The Development of State Legislation Concerning the Free Negro (1958).

[11] See generally 1 Fleming, Documentary History of Reconstruction 273-312 (1906); J. McPherson, History of the Reconstruction 29-44 (1971). See also Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 11-12, 56-58 (1956).

[12] See J. tenBroek, Equal Under Law 177-81, 203-04 (1965).

> withhold from them the equal protection of the laws, and authorized Congress to enforce its provision by appropriate legislation. To quote the language used by us in the Slaughter-House Cases, 'No one can fail to be impressed with the one pervading purpose found in all the Amendments, lying at the foundation of each, and without which none of them would have been suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them.' So again: 'The existence of laws in the States, where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied, and by it [the 14th Amendment] such laws were forbidden.'
>
> If this is the spirit and meaning of the Amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizes, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white: that all persons whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color?

Strauder v. West Virginia, 100 U.S. 303, 306-07 (1886).

Despite these federal constitutional and legislative efforts, de jure discrimination in state criminal statutes, although outlawed by the Fourteenth Amendment, continued to plague the administration of justice, especially in the Southern states. The climate of public sentiment in which such official

discrimination persisted was given judicial notice by the Georgia Court of Appeals in 1907, in a case upholding a cause of action in tort for calling a white man black:

> It is a matter of common knowledge that, viewed from a social standpoint, the negro race is, in mind and morals, inferior to the Caucasian. The record of each from the dawn of historic time denies equality ... We take judicial notice of an intrinsic difference between the two races ... Courts and juries are bound to notice the intrinsic difference between the whites and blacks in this country.

Wolfe v. Georgia Ry. & Elec. Co., 2 Ga. App. 499, ____, 58 S.E. 899, 901-02 (1907) (emphasis added).[13]

These discriminatory views, needless to say, fostered a body of law in the State of Georgia and elsewhere intensely hostile to black people. In addition to a comprehensive code of civil law designed to segregate the races in most areas of public life,[14] there was widespread disregard within the criminal justice system

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[13] See generally University of California Regents v. Bakke, 438 U.S. 265, 390-94 (1978) (opinion of Marshall, J.). Cf. Plessy v. Ferguson, 163 U.S. 537, 548-52 (1896) ("we think the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws.... If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane.").

[14] See, e.g., States' Laws on Race and Color 89-117 (P. Murray, ed. 1950) (cataloguing Georgia constitutional and statutory provisions enacted to establish a system of racial segregation.) Among these statutes, for example, is one making it a misdemeanor for any "person controlling convicts [to] ... confine white and colored convicts together, or work them chained together, or chain them together going to or from their work, or at any other time." Id. at 115, (citing Former Ga. Code § 77-9904 (1950)).

for the rights of black defendants especially, for those charged with capital crimes,[15] as well as frequent resort to extra-legal violence against black criminal suspects.[16]

In determining appropriate punishments, Gunner Myrdal reported in 1942, both the race of the defendant and that of the victim played an important part:

> [T]he discrimination does not always run against a Negro defendant. It is part of the Southern tradition to assume that Negroes are disorderly and lack elementary morals, and to show great indulgence toward Negro violence and disorderliness 'when they are among themselves.'
>
> For offenses which involve any actual or potential danger to whites, however, Negroes are punished more severely than whites.
>
> * * *
>
> Public tension and community pressure increase with the seriousness of the alleged crime.... There is thus even less possibility for a fair trial when the Negro's crime is serious. In the case of a threatened lynching, the court makes no pretence at justice; the Negro must be condemned, and usually condemned to death, before the crowd gets him.[17]

It is well known to this Court that the influence of racial discrimination did not disappear from state criminal justice systems after World War II. On the contrary, the distorting effects of racial prejudice have continued well into the present era, in the State of Georgia, as elsewhere.[18] As Justice Blackmun

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[15] See, e.g., Downer v. Dunaway, 1 F. Supp. 1001 (M.D. Ga. 1932) (state trial of black defendant, dominated by mob violence, violated due process; habeas relief granted).

[16] Between 1900 and 1929, the State of Georgia had the third highest rate of lynching of any state. F. Raper, The Tragedy of Lynching 483 (1933). Four black men were lynched in Monroe County, Georgia as late as 1946. N.Y. Times, July 27, 1946, § 1 at 1.

[17] 2 G. Myrdal, An American Dilemma: The Negro Problem & Modern Democracy 551, 553 (1944).

[18] See, e.g., Screws v. United States, 325 U.S. 91 (1945) (Sheriff of Baker County, Georgia, beat black defendant to death on courthouse lawn during arrest for theft of a tire); Avery v. Georgia, 345 U.S. 559 (1953) (black jurors systematically

has written, "we ... cannot deny that, 114 years after the close of the War Between the States and nearly 100 years after Strauder [v. West Virginia, supra,] racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious." Rose v. Mitchell, 443 U.S. 545, 558-59 (1979).

2. Race and the Death Penalty

The racial discrimination so widely observed in the criminal justice system of past years has worked particular evil in the area of capital punishment. Statistics compiled nationally from 1930 through 1967 reveal that black persons, although never more than 12 percent of the population, constituted over 53 percent of all those executed during this period.[19] For the crime of rape, blacks constituted a remarkable 405 of the 455 total executions that took place.[20] Social scientists who have examined these phenomena more closely report that the disparities are not attributable solely to a higher incidence of crime among blacks. Rather, "[s]trong statistically significant differences in the proportions of blacks sentenced to death, compared to whites,

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excluded from black defendant's capital jury by use of separate white and yellow tickets for white and black prospective jurors); Williams v. Georgia, 349 U.S. 375 (1955) (same); Reece v. Georgia, 350 U.S. 85 (1955) (grand and traverse jury discrimination); Whitus v. Georgia, 385 U.S. 545 (1967) (jury discrimination by use of segregated tax records); Jones v. Georgia, 389 U.S. 24 (1967) (same); Sims v. Georgia, 389 U.S. 404 (1967) (same); Turner v. Fouche, 396 U.S. 346 (1970) (underrepresentation of blacks on Taliaferro County, Georgia grand juries).

[19] United States Dept. of Justice, Bureau of Prisons, National Prisoner Statistics, No. 46, Capital Punishment 1930-1970, 8 (Aug. 1971).

[20] Id.

when a variety of nonracial aggravating circumstances are considered, permit the conclusion that the sentencing differentials are the product of racial discrimination."[21]

The possibility of racial bias clearly troubled a number of Justices who voted in Furman v. Georgia, 408 U.S. 238 (1972) (per curiam), to strike down the capital statutes of Georgia and every other state that then imposed the death penalty.[22] When Georgia's post-Furman capital statutes subsequently came before the Court for review in Gregg v. Georgia, 428 U.S. 153 (1976), counsel for Gregg urged that continued discrimination would be virtually

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[21] Wolfgang & Riedel, Race, Judicial Discretion and the Death Penalty, 407 Annals 119 (May 1973). See generally W. Bowers, Legal Homicide: Death as Punishment in America 1864-1982 67-102 (1984) Ch. 3, Race Discrimination in State-Imposed Executions; Johnson, The Negro and Crime 217 Annals 93 (1941); Garfinkel, Research Note on Inter- and Intra-Racial Homicides, 27 Social Forces 369 (1949); Wolfgang & Reidel, Rape, Race, and the Death Penalty in Georgia, 45 Am. J. Orthopsychiat. 658 (1975); Bowers & Pierce, Arbitrariness and Discrimination under Post-Furman Capital Statutes, 26 Crime & Delinq. 563 (1980); Radelet, Racial Characteristics and the Imposition of the Death Penalty, 46 Am. Soc. Rev. 918 (1981); Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience, 95 Harv. L. Rev. 456 (1981).

[22] E.g. Furman v. Georgia, supra, 408 U.S. at 249 (Douglas, J., concurring) ("[t]he President's Commission on Law Enforcement and Administration of Justice recently concluded: 'Finally there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups'); id. at 309-10 (Stewart, J., concurring) ("the petitioners are among a capriciously selected random handful upon whom the sentence of death has been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few sentenced to die, it is the constitutionally impermissible basis of race"); id. at 364 (Marshall, J., concurring) ("capital punishment is imposed discriminatorily against certain identifiable classes of people ... studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination"). Cf. id. at 389 n.12 (Burger, C. J., dissenting) ("[s]tatistics are also cited to show that the death penalty has been imposed in a racially discriminatory manner. Such statistics suggest, at least as a historical matter, that Negroes have been sentenced to death with greater frequency than whites in several States"); id. at 449-50 (Powell, J., dissenting) ("[i]f a Negro defendant ... could demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense, a constitutional violation might be established.")

inevitable, since "the capital sentencing procedures adopted by Georgia in response to Furman [did] not eliminate the dangers of arbitrariness and caprice in jury sentencing that were held in Furman to be violative of the Eighth and Fourteenth Amendments." Gregg v. Georgia, supra, 428 U.S. at 200. The Court did not disagree with counsel's premise that, under Furman, the Eighth Amendment requires eradication of the influence of racial prejudice in capital sentencing. To the contrary, the Court reiterated Furman's central holding that "[b]ecause of [its] uniqueness ... the death penalty ... [may] not be imposed under sentencing procedures that create[] a substantial risk that it [will] ... be inflicted in an arbitrary and capricious manner." Gregg v. Georgia, supra, 428 U.S. at 188.

However, after reviewing the new sentencing procedures prescribed by the Georgia statute, id. at 196-98, the Court held that "[o]n their face these procedures seem to satisfy the concerns of Furman." Id. at 198. This conclusion rested on an assessment that Georgia's bifurcation of the guilt and sentencing proceedings, its provision of sentencing guidelines, and its requirement of appellate sentence review furnished prima facie "assurance that the concerns that prompted our decision in Furman are not present to any significant degree in the Georgia procedure applied here." Id. at 207. Justice White, writing for himself, the Chief Justice, and Justice Rehnquist, agreed, finding Gregg's argument "considerably overstated," id. at 221. He reasoned that "[t]he Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute ... I cannot accept the naked assertion that the effort is bound to fail." Id. at 222. Justice White thus declined to speculate --

in the absence of clear proof to the contrary -- that Georgia's experiment with "guided discretion" statutes would inevitably fail to curb racial discrimination or arbitrariness:

> Indeed, if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any category of crime will be set aside.
>
> * * *
>
> Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts ... Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.

Id. 224-25.

In the post-Gregg era, however, the Court has emphasized that its approval of the facial validity of Georgia's capital sentencing procedures constitutes something less than a licensing of any and every result which they produce. Georgia has "a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty," Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (emphasis added); and the very ratio decidendi of Gregg "recognized that the constitutionality of Georgia death sentences ultimately would depend on the Georgia Supreme Court construing the statute and reviewing capital sentences consistently with ... [the] concern [of Furman]." Zant v. Stephens [I], 456 U.S. 410, 413 (1982) (per curiam). If "Georgia attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as ... the

race ... of the defendant, ... due process of law would require that the jury's decision to impose death be set aside." Zant v. Stephens [II], 462 U.S. 862, 885 (1983).

Thus, the ultimate Eighth Amendment test, the Court has plainly said, remains whether Georgia's capital sentencing system actually works, whether its procedures truly serve to eliminate the invidious racial distinctions that have haunted its past use of the death penalty.

3. Petitioner's Record Evidence: The Baldus Studies

Petitioner Warren McCleskey -- a young black man sentenced to death for the murder of a white Atlanta police officer -- has alleged that the Georgia system under which he was sentenced is racially discriminatory in its application, and is arbitrary and capricious, violating in practice both the Eighth Amendment and Equal Protection Clause of the Fourteenth Amendment. To support those claims, petitioner presented a comprehensive body of evidence to the District Court during a two-week evidentiary hearing held August 8-22, 1983.

Petitioner's submissions included: (i) two multifaceted social scientific studies of the actual application of Georgia's capital sentencing system from 1973-1979, each comprising information on hundreds of relevant items about each case (including statutory and non-statutory aggravating circumstances, mitigating circumstances, strength-of-the-evidence factors, and factors concerning the victim and the defendant); (ii) a statistical study of capital sentencing in Fulton County, where petitioner was tried and sentenced; (iii) two nonstatistical "cohort" studies, one investigating all police homicides in Fulton County since 1973, the other examining those "near neighbor" homicides in Fulton County similar to Warren

McCleskey's; and (iv) the deposition testimony of the Fulton County District Attorney concerning the sentencing policies and procedures of his office in homicide cases.[23]

Petitioner's expert witnesses included Professor David Baldus, one of the nation's leading authorities on the legal use of statistics to evaluate claims of racial discrimination;[24] Dr. George Woodworth, a prominent theoretical and applied statistician;[25] and -- to evaluate the work of Baldus and Woodworth -- Dr. Richard Berk, a highly qualified social scientist, frequently consulted on criminal justice issues by the United States Department of Justice, who served as a member of a distinguished National Academy of Sciences panel charged with establishing professional standards for the conduct of sentencing research.[26]

Professors Baldus and Dr. Woodworth testified concerning their comprehensive studies of the operation of Georgia's capital sentencing system for the period 1973-1979. Baldus explained that the studies were designed from the outset to evaluate possible racial discrimination in Georgia's post-Furman capital system: "[T]he decision of the Court in Gregg proceeded on the

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[23] Petitioner also sought discovery from the State to develop anecdotal and historical evidence of racial discrimination in the criminal justice system of Fulton County and the State of Georgia, and, more broadly, in all city, county and state government activities. See Petitioner's Motion for Discovery, dated April 7, 1983. The District Court denied petitioner's request for this discovery, holding that this information was "not relevant to any issue presented by the petitioner." Order of June 3, 1983, at 2. Consequently, petitioner was unable to present such evidence during his evidentiary hearing.

[24] Professor Baldus is co-author of D. Baldus & J. Cole, Statistical Proof of Discrimination (1980), a work widely relied upon by federal and state courts. See cases cited in DB 6. (Each of petitioner's exhibits bears the initials of the witness through whom it was offered, e.g., David Baldus exhibits are marked "DB," followed by the appropriate exhibit number).

[25] GW 1.

[26] RB 1; see Tr. 1761-62. (All references to the transcript of the evidentiary hearing held in the District Court on August 8-22, 1983, will be indicated by the abbreviation "Tr." followed by the number of the page on which the reference may be found.)

assumption that the procedural safeguards adopted in ... Georgia ... were adequate to insure that death sentencing decisions would be neither excessive nor discriminatory.... [M]y principal concern was [to investigate] whether or not those assumptions ... were valid." (Tr. 129).

Baldus' studies followed state-of-the-art procedures in questionnaire design, data collection, and data analysis. Since the Court of Appeals assumed the validity of Baldus' studies -- denying relief on the ground that petitioner's claims failed as a matter of law, see App. A. McCleskey v. Kemp, supra, 753 F.2d at 886, 894 -- we will not detail here the extraordinary procedures by which Baldus assured the accuracy and completeness of his data. A more thorough discussion of his methodology appears in Appendix E. Here it suffices to repeat the judgment of Dr. Berk, who evaluated their quality and soundness in light of his prior comprehensive review of sentencing research for the National Academy of Sciences:

> [Baldus' studies] ha[ve] very high credibility, especially compared to the studies that [the National Academy of Sciences] ... reviewed. We review hundreds of studies on sentencing ... and there's no doubt that at this moment, this is far and away the most complete and thorough analysis of sentencing that's ever been done. I mean there's nothing even close.

(Tr. 1766).

The two Baldus studies show this: Georgia's post-Furman administration of the death penalty is marked by persistent racial disparities in capital sentencing -- disparities by race of the victim and by race of the defendant -- that are highly statistically significant and cannot be explained by any of the hundreds of offer sentencing factors for which Baldus controlled. (Tr. 726-28). Baldus' unadjusted figures reveal that Georgia capital defendants who kill white victims are eleven times more

likely to receive a death sentence than are those who kill black victims. Among all persons indicted for the murder of whites, black defendants receive death sentences nearly three times as often as white defendants: 22% to 8%. (DB 63). Baldus testified that his expert opinions did not rest upon these unadjusted figures, however. To the contrary, he subjected his data to a wide variety of increasingly sophisticated analytical methods, employing dozens of models of varying complexity to determine whether plausible factors other than race might explain the gross racial disparities. (Tr. 734; see, e.g., DB 78, 79 80, 83, 98; GW 4). They did not. Rather, the race of the defendant and the race of the victim proved to be as powerful determinants of capital sentencing in Georgia as many of Georgia's statutory aggravating circumstances. (See DB 81). The race of the victim, for example, counts as much in practice toward increasing the likelihood of a death sentence as whether the defendant has a prior murder conviction, or whether he is the prime mover in the homicide. (See DB 81). The race of the defendant proves more important than a history of drug or alcohol abuse, or whether the defendant is under age 17. (Id).

To quantify the effect of race on capital sentences in Georgia, Baldus employed a variety of additional procedures, among them the "index method," an application of the well-recognized statistical technique of crosstabulation. In indexing the cases, he first sorted the cases into eight groups, according to their overall "level of aggravation." (Tr. 876-79). He then analyzed the racial disparities that appeared within each group of increasingly more aggravated cases. Some ninety percent of the cases fell into groups in which almost no one received a

death sentence. In these groups, naturally, since nearly every defendant was given a life sentence, no racial disparities appeared. (Tr. 878-79; see DB 89).

Yet when Baldus took the two most aggravated groups, containing approximately 400 cases, and subdivided them into eight subgroups, gross racial disparities became crystal clear. Baldus found dramatic, persistent differences by race of the victim (compare especially columns C and D):

A	B	C	D	E
Predicted Chance of a Death Sentence 1 (least) to 8 (highest	Average Actual Sentence-ing Rate for the Cases at Each Level	Death Sentencing Rates for Black Defendants Involving		Arithmetic Difference in Rate of the Victim Rates (Col. C - Col. D)
		White Victim Cases	Black Victim Cases	
1	.0 (0/33)	.0 (0/9)	.0 (0/19)	.0
2	.0 (0/55)	.0 (0/8)	.0 (0/27)	.0
3	.08 (6/76)	.30 (3/10)	.11 (2/18)	.19
4	.07 (4/57)	.23 (3/13)	.0 (0/15)	.23
5	.27 (15/58)	.35 (9/26)	.17 (2/12)	.18
6	.17 (11/64)	.38 (3/8)	.05 (1/20)	.33
7	.41 (29/71)	.64 (9/14)	.39 (5/13)	.25
8	.88 (51/58)	.91 (20/22)	.75 (6/8)	.16

(DB 90), and by race of the defendant:

A	B	C	D	E
Predicted Chance of a Death Sentence 1 (least) to 8 (highest	Average Actual Sentence-ing Rate for the Cases at Each Level	Death Sentencing Rates for White Victims Involving Black Defendants	Death Sentencing Rates for White Victims Involving White Defendants	Arithmetic Difference in Race of the Defendant Rates (Col. C - Col. D)
1	.0 (0/33)	.0 (0/9)	.0 (0.5)	.0
2	.0 (0/55)	.0 (0/8)	.0 (0/19)	.0
3	.08 (6/76)	.30 (3/10)	.03 (1/39)	.27
4	.07 (4/57)	.23 (3/13)	.04 (1/29)	.19
5	.27 (15/58)	.35 (9/26)	.20 (4/20)	.15
6	.18 (11/64)	.38 (3/8)	.16 (5/32)	.22
7	.41 (29/71)	.64 (9/14)	.39 (15/39)	.25
8	.88 (51/58)	.91 (20/22)	.89 (25/28)	.02

(DB 91).

Baldus observed that, even among these 400 cases, little disparity appeared in the less aggravated cases. "[B]ut once the [overall] death sentencing rate begins to rise, you'll note that it rises first in the white victim cases. It rises there more sharply than it does in the black victim cases." (Tr. 882-83.) As Judge Clark noted in his opinion below:

> Race is a factor in the system only where there is room for discretion, that is, where the decision maker has a viable choice. In the large number of cases, race has no effect. These are the cases where the facts are so mitigated the death penalty is not even considered as a possible punishment. At the other end of the spectrum are the tremendously aggravated murder cases where the defendant will very probably receive the death penalty, regardless of his race or the race of the victim. In between is the mid-range of cases

> where there is an approximately 20% racial disparity.

App. A., 753 F.2d at 920 (Clark, J., dissenting in part & concurring in part). (See Tr. 865-71; 882-85).

In addition to the index method, Baldus used a variety of multiple regression techniques to calculate the effects of race on Georgia capital sentences. As he explained, multiple regression analyses permit one to measure the average impact of a single factor (or "variable"), such as the race of the defendant, across all of the cases. The "regression coefficient" describes the average effect of that factor, after adjusting for (or "controlling" for) the cumulative impact of all other factors considered. For example, a coefficient of .06 indicates that the presence of that factor in a case would increase the likelihood of a death sentence by an average of six percentage points.[27]

Baldus conducted a wide array of such analyses, employing dozens of combinations of variables (or "models") designed to include the various important factors which may enter into capital sentencing determinations. Among these factors were statutory and nonstatutory aggravating circumstances, mitigating circumstances and variables relating to the strength of the evidence. Some models employed all 230 of Baldus' factors (see DB 83); one was specifically designed by the District Court, at petitioner's invitation, to reflect those factors which the court judged most appropriate and influential in determining capital sentencing outcomes. (Tr. 810; 1426; 1475-76; see Court's Ex. 1). All showed race-of-victim disparities, virtually all of

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[27] It is important to realize that this does not mean a six percent increase but a six percentage point increase. Thus, for example, if the overall likelihood of a death sentence in a given category of cases is .05, or 5-in-100, a .06 coefficient for the factor "white victim" would mean a six point increase in the likelihood of death for such cases, to .11, or 11-in-100. That would, of course, amount to a 120 percent increase in the likelihood that a death sentence would be imposed.

which were highly statistically significant. Many showed race-of-defendant disparities as well.[28] For example, DB 83 reflected the following results:

W.L.S. REGRESSION RESULTS

	A	B	C
		Coefficients and Level of Statistical Significance	
	Non-Racial Variables in The Analysis	Race of Victim	Race of Defendant
a)	230 + aggravating, mitigating, evidentiary and suspect factors	.06 (.02)	.06 (.02)
b)	Statutory aggravating circumstances and 126 factors derived from the entire file by a factor analysis	.07 (.01)	.06 (.01)
c)	44 non-racial variables with a statistically significant relationship (P<.10) to death sentencing	.07 (.0002)	.06 (.0004)
d)	14 legitimate, non-arbitrary and statistically (P<.10) significant factors screened with W.L.S. regression procedures	.06 (.001)	.06 (.001)
e)	13 legitimate, non-arbitrary and statistically significant (P<.10) factors screened with logistic regression procedures	.06 (.001)	.05 (.02)

(DB 83).

[28] Statistical significance, Baldus explained, is a measure of the likelihood that disparate results could be observed in a sample of cases merely by chance if, in the capital sentencing system as a whole, there are in fact no disparities as large as those observed in the sample. (Tr. 712-15). As conventionally expressed in "probability" or "p" values, a figure of .05 means that the likelihood of a chance finding is 5-in-100; a "p" of .01, 1-in-100. The "p" values in the table above appear in parentheses beneath each coefficient.

The Court of Appeals seized upon the .06 coefficient reported by Baldus for his 230-plus model in DB 83 as the best measure of the overall impact of the race of the victim on capital sentencing outcomes. See App. A., 753 F.2d at 896. This .06 average includes those 90 percent of Georgia cases in which the aggravation level is so low that death sentences are virtually never imposed, as well as the highly aggravated cases in which nearly everyone receives a death sentence. In almost none of these low- and high-aggravation cases do racial disparities appear to be of any consequence. Thus the .06 overall average obviously reflects extraordinarily strong racial disparities within that class of cases in which a choice between a life sentence and a death sentence is a serious option for the jury.

The average race-of-victim disparity among those so-called "midrange" cases, which comprise the bulk of the 400 most serious cases reflected in Baldus' index analysis (see page 19 supra), is roughly a twenty percentage point difference. (Tr. 1738-40). In other words, if the average death sentencing rate in the midrange is fifteen out of one hundred, the circumstances of a white victim increases the likelihood to thirty-five out of one hundred.

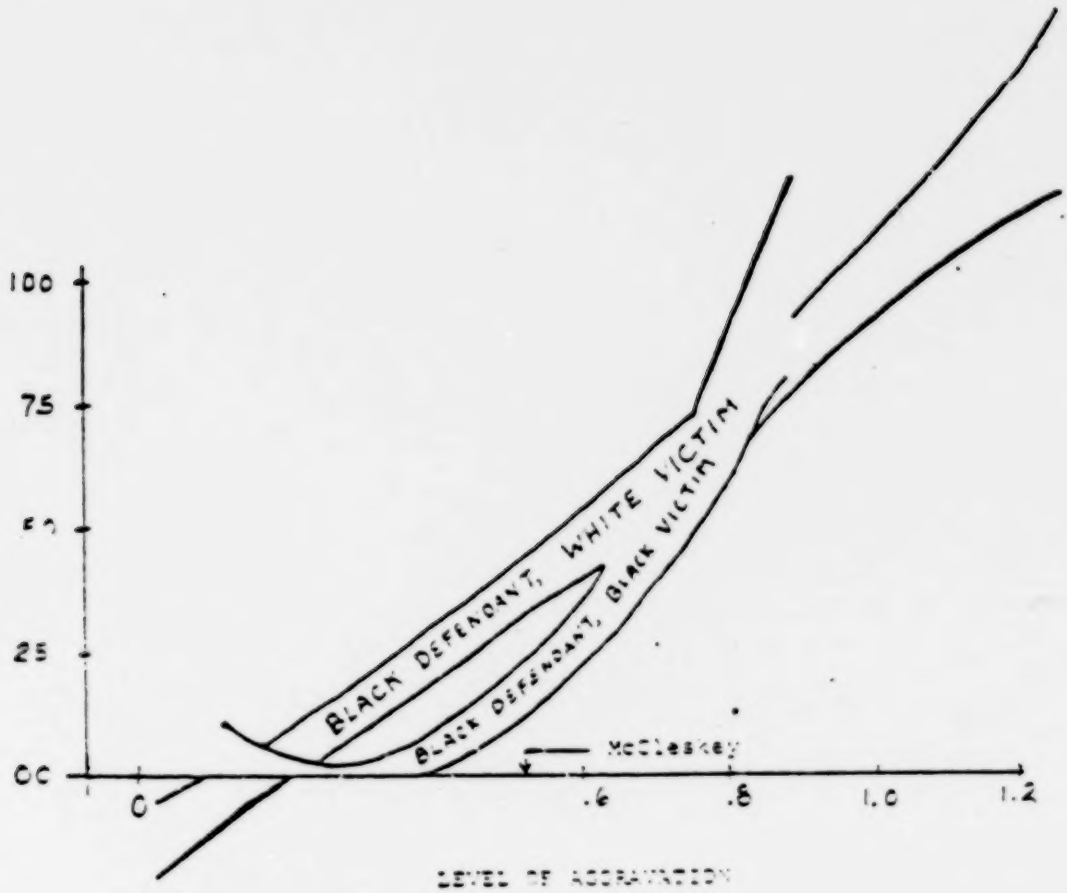
Petitioner introduced a figure illustrating the sentencing rates among black defendants by race-of-victim:

[insert GW 8 here]

(GW 8). Not only does GW 8 reflect a .20 average disparity in the midrange of cases; it demonstrates, as Dr. Woodworth testified without contradiction, that petitioner McCleskey's own crime

GW8

Figure 2: Midrange[a/] Model With Interactions and Nonlinearities--Black Defendants



[a/] The curves represent 95% confidence bounds on the average death sentencing rate at increasing levels of aggravation (redrawn from computer output).

falls in the middle of the midrange. In fact, after reviewing the results of three separate statistical techniques, Dr. Woodworth was able to conclude:

> [A]t Mr. McCleskey's level of aggravation the average white victim case has approximately a twenty percentage point higher risk of receiving the death sentence than a similarly situated black victim case.

(Tr. 1740).

Petitioner offered additional evidence, some of it statistical and some non-statistical, to identify more precisely the likely impact of Georgia's pervasive racial disparities on petitioner McCleskey's case. First, Baldus reported upon his analysis of data from Fulton County, where petitioner was tried. He testified that his performance of progressively more sophisticated analyses for Fulton County, similar to those he had employed statewide, "show a clear pattern of race of victim disparities in death sentencing rates among the cases which our analyses suggested were death eligible." (Tr. 983; see also 1043-44).

To supplement this statistical picture, Baldus examined a "cohort" of 17 Fulton County defendants arrested and charged, as was petitioner, with homicide of a police officer during the 1973-1979 period. Only two among the seventeen, Baldus found, even went to a penalty trial. One, whose police victim was black, received a life sentence. (Tr. 1050-62; DB 116). Petitioner, whose police victim was white, received a death sentence. Although the numbers were small and therefore require caution, "the principal conclusion that one is left with," Baldus testified, "is that ... this death sentence that was imposed in McCleskey's case is not consistent with the disposition of cases involving police officer victims in this county." (Tr. 1056).

Baldus conducted a second cohort study, examining the facts of those cases in Fulton County that scored nearest to petitioner McCleskey in their overall level of aggravation ("near neighbors" cases). (Tr. 986-91). After sorting the 32 closest into typical, more aggravated and less aggravated cases, employing a qualitative measure (Tr. 991), Baldus computed death sentencing rates for the cases broken down by race of victim and race of defendant. Within petitioner McCleskey's group, the difference in treatment by race of the victim was forty percentage points. (Tr. 993).

In sum, most of Baldus' many measures revealed strong, statistically significant disparities in capital sentencing in Georgia homicide cases, based upon the race of the victim. (Tr. 726-28). Race-of-defendant disparities also regularly appeared, although not with the invariable consistency and statistical significance of the victim statistics. Id. In response to the District Court's question whether he could "say that what caused McCleskey to get the death penalty ... was the fact that he murdered a white person," (Tr. 1085), Baldus concluded:

> No, I can't say that was the factor. No. But what I can say, though, is when I look at all the other legitimate factors in his case, and I look to the main line of cases in this jurisdiction, statwide, that are like his, particularly the way B2 cases[29] and cases involving officer victims are disposed of in this jurisdiction, his case is substantially out of line with the normal trend of decision on such cases ... I can't see any factors, legitimate factors in his case that would clearly call for it, that would distinguish it clearly from the other cases ... So you're left with what other factor it might be, and what I can say, and what I do say is that the racial factor is possibly the thing that made the difference in the case. [A] real possibi-

[29] The reference is to former Ga. Code Ann. § 27-2534.1(b)(2), which designates as an aggravating circumstance that "[t]he offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony." Petitioner's jury was charged on this aggravating circumstance.

> lity in my estimation, that that's what made the difference. But I can't say with any, I can't quantify the likelihood that that is true. That's as far as I think I can go in terms of making responsible judgment.

(Tr. 1085-86).

In response to petitioner's submission, the State did not point to any analysis by Baldus in which the racial disparities disappeared or ran counter to petitioner's claims. The State offered no alternative model which might have reduced or eliminated the racial disparities. (Tr. 1609). The State did not even propose -- much less test the effect of -- any additional "explanatory variables," such as factors related to the crime, the victim, or the defendant. (Id.) Indeed, it admitted that it did not know whether the addition of any such factors "would have any effect or not." (Tr. 1567).

The State performed no multivariate analyses of its own to determine whether black and white victim or defendant cases were being treated differently in the State of Georgia. (Tr. 1615). Indeed, the State even declined an offer made by petitioner during the hearing to take any alternative factors proposed by the State, have petitioner's experts calculate their effects, and determine whether the results might reduce or eliminate the racial effects observed by Baldus. (Tr. 1475-76). In short, the State presented no affirmative rebuttal case at all.[30]

The State's principal expert did offer one hypothesis in rebuttal: that Georgia's apparent racial disparities could be explained by the generally more aggravated nature of white-victim

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[30] What the State did do was to attempt to attack the integrity of the sources of petitioner's data -- data gathered by petitioner's experts with the cooperation of state officials from the files of the Supreme Court of Georgia, the Georgia Department of Pardons and Paroles, and the Georgia Department of Corrections. Petitioner's detailed description of the data-gathering methods, and his factual comment on the State's challenges to them, appear in Appendix E.

cases. However, that expert never addressed the factual question critical to his own theory -- whether white- and black-victim cases at the same level of aggravation are treated similarly, or differently by the State of Georgia. (Tr. 1664). He merely acknowledged on cross-examination that to do so "would have been desirable." (Tr. 1613). Petitioner's experts did then address this hypothesis directly. (Tr. 1297; 1729-32). After testing it thoroughly (Tr. 1291-96; see GW 5-8; DB 92), they were able to demonstrate without contradiction that it could not explain Georgia's racial disparities in capital sentencing. (Tr. 1732).

4. The Opinion of the Court of Appeals

In its opinion, the Court of Appeals does not quarrel with the factual findings of petitioner's studies. To the contrary, it expressly "assum[es] the validity of the research," App. A., 753 F.2d at 886, and "that it proves what it claims to prove." Id. See also id. at 894. The Court instead rejects petitioner's claims as a matter of law, concluding that Baldus' findings "would not support a decision that the Georgia law was being unconstitutionally applied, much less ... compel such a finding, the level which petitioner would have to reach in order to prevail on this appeal." Id. at 886-87.

The legal analysis producing this result proceeds on two principal fronts. First, the Court holds that the proof required to prevail on an Eighth Amendment claim, at least when race is alleged to have played a part in the sentencing system, is not substantially distinguishable from the proof of intentional discrimination required to establish an equal protection claim. Id. at 891-92. The Court admits that "cruel and unusual punishment cases do not normally focus on the intent of the governmental actor," id. at 892, but reasons that "where racial discrimination is claimed, not on the basis of procedural faults or flaws

in the structure of the law, but on the basis of decisions made within [the capital sentencing] process, then purpose, intent and motive are a natural component of the proof that discrimination actually occurred." Id. "We, therefore, hold," the Court concluded, "that proof of a disparate impact alone is insufficient to invalidate a capital sentencing system, unless ... it compels a conclusion ... of purposeful discrimination -- i.e., race is intentionally being used as a factor in sentencing...." Id.

Turning to petitioner's Fourteenth Amendment challenge and to his statistical case under both the Eighth and Fourteenth Amendments, the Court addresses and resolves, in novel fashion, a host of important legal issues: (i) the proper limits of statistical evidence in proving intent; (ii) the utility of multiple regression analysis; and (iii) the proper prima facie burden to place on a petitioner alleging intentional discrimination, including: (a) the magnitude of disparity that must be shown; (b) the extent to which other variables must be anticipated and accounted for; (c) the need to identify those specific actors who have intentionally discriminated; and (d) the need to prove individual injury. The Court creates as well a new rule for cases where, as here, gross disparities appear larger in one portion of the system (the "midrange") than in the system as a whole. Finally, it sets forth a standard to be employed by the lower courts in determining whether evidence of racial discrimination in capital sentencing warrants an evidentiary hearing. We will briefly review each of these holdings.

The majority opinion acknowledges that "[t]o some extent a broad issue before this Court concerns the role that social science is to have in judicial decisionmaking." Id. at 887. In addressing that theme, the Court expresses deep skepticism about the power of statistical evidence, especially to prove intent.

"If disparate impact is sought to be proved," the Court reasons, "statistics are more useful than if the causes of that impact must be proved. Where intent and motivation must be proved, the statistics have even less utility." Id. at 888. Although it cites prior holdings that "'statistics alone ... under certain limited circumstances ... might [establish intentional discrimination],'" id., the Court's basic instinct is clearly that "[t]o utilize conclusions from such research to explain the specific intent of a specific behavioral situation goes beyond the legitimate uses for such research." Id. "The lesson ... must be that generalized statistical studies are of little use in deciding whether a particular defendant has been unconstitutionally sentenced to death." Id. at 893.[31]

The Court's reservations about the ultimate utility of statistical evidence are directly related to the extraordinary prima facie standard it sets for a petitioner who would prove intentional discrimination. It is not sufficient, the Court holds, to offer proof that such discrimination is more likely than not:

> [P]roof of a disparate impact alone is insufficient to invalidate a capital sentencing system unless that impact is so great that it compels a conclusion that the system is

[31] The Court also appears to reject the fundamental property of regression analysis: its ability to measure the independent impact of a particular variable on the operation of a system as a whole and reflect that impact in a coefficient. For example, the Court states: "The Baldus study statistical evidence does not purport to show that McCleskey was sentenced to death because of either his race or the race of his victim. It only shows that in a group involving blacks and whites, all of whose cases are virtually the same, there would be more blacks receiving the death penalty than whites and more murderers of whites receiving the death penalty than murderers of blacks. The statisticians' 'best guess' is that race was a factor in those cases and has a role in the sentencing structure in Georgia." Id. at 895. Similarly, at another point, the Court finds: "[T]he 20% disparity in this case does not purport to be an actual disparity. Rather, the figure reflects that the variables included in the study do not adequately explain the 20% disparity and that the statisticians can explain it only by assuming the racial effect." Id. at 898.

> unprincipled, irrational, arbitrary and capricious such that purposeful discrimination ... can be presumed to permeate the system.

Id. at 892 (emphasis added). The Court repeatedly insists that the "disparity [be] .... sufficient to compel a conclusion that it results from discriminatory intent and purpose," id. at 893. See also id. at 886-87. It occasionally phrases the prima facie burden alternatively as a showing "of racially disproportionate impact ... so strong as to permit no inference other than that the results are the product of a racially discriminatory intent or purpose." Id. at 889 (emphasis added). See id. at 890.

The Court quickly clarifies, however, that even unquestioned proof that a racial disparity does exist will not suffice to prove a constitutional violation unless the disparity can be shown to be of a sufficient magnitude: "The key to the problems lies in the principle that the proof, no matter how strong, of some disparity is alone insufficient." Id. at 894. Turning to the six percentage point overall difference demonstrated in Georgia's capital sentencing system, the opinion concludes that,

even if "true, this figure is not sufficient to overcome the presumption that the statute is operating in a constitutional manner."[32] Id. at 897.

The Court stops short, however, of declaring that the 20 point disparity Baldus reported for the midrange of cases is likewise insufficient. Instead the Court complains that "Baldus did not testify that he found statistical significance in the 20% disparity figure,[33] and that "he did not adequately explain the rationale of his definition of the midrange of cases ... leav-[ing] this Court unpersuaded that there is a rationally classified, well-defined class of cases in which it can be demonstrated that a race-of-victim effect is operating with a magnitude approximately 20%."[34] Id. at 898.

Beyond its insistence that a prima facie showing must include racial disparities of a large, though unspecified, magnitude, the Court of Appeals also appears to suggest that no statistical analysis can be fully adequate if it fails to account for every factor that might conceivably affect sentencing outcomes. The Court faults Baldus' studies, despite their inclusion of over 230 possible sentencing considerations, because his "approach ... ignores quantitative [sic] differences in

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[32] The Court of Appeals grounds its holding in part upon this Court's disposition of stay applications in three capital cases from Florida -- Sullivan v. Wainwright, ____ U.S. ____, 78 L.Ed.2d 210 (1983); Wainwright v. Adams, ____ U.S. ____, 80 L.Ed.2d 809 (1984); and Wainwright v. Ford, ____ U.S. ____, 82 L.Ed.2d 911 (1984). Noting that the study proffered in those cases reported a disparity similar to one of Baldus' findings, the Court concludes that "it is reasonable to suppose that the Supreme Court looked at the bottom line indication of racial effect [in the Florida study] and held that it simply was insufficient to state a claim." Id. at 897. From that speculation, the majority proceeds to a conclusion that all of the disparities reported by Baldus are insufficient.

[33] In fact, the table from which this figure is derived indicates that it is statistically significant at the .01 level. (See DB 90 n.1).

[34] But see Tr. 879-85 for Professor Baldus' testimony on this point.

cases: looks, age, personality, education, profession, job, clothes, demeanor, and remorse, just to name a few," id. at 899, and is "incapable of measuring qualitative differences of such things as aggravating and mitigating factors." Id. "Generalized studies," the Court states,

> would appear to have little hope of excluding every possible factor that might make a difference between crimes and defendants, exclusive of race. To the extent there is a subjective or judgmental component to the discretion with which a sentence is invested, not only will no two defendants be seen identical by the sentencers, but no two sentencers will see a single case precisely the same. As the court has recognized, there are 'countless racially neutral variables' in the sentencing of capital cases."

Id. at 894 (citing Smith v. Balkcom, 671 F.2d 858, 859 (5th Cir. Unit B 1982).

After thus reiterating the theme that capital cases are routinely affected by a myriad of objective and subjective considerations, some of them too intangible to be recorded, the Court in its next thought appears to require a death-sentenced petitioner to demonstrate that particular actors in his own case possessed the specific intent to discriminate, and that their conscious racial biases brought about his sentence. See App. A., 753 F.2d at 892, 894. We have earlier pointed out the Court's concern for proof of malignant intent. Its insistence on proof of the causal connection between such intent and the death sentence under attack seems equally clear. The Court several times identifies as a "limitation" of the Baldus studies that "[t]here was no suggestion that a uniform, institutional bias existed that adversely affected defendants in white victim cases in all circumstances, or a black defendant in all cases." Id. at 887. Lacking this, the Court demands and fails to find evidence of racial animus in McCleskey's individual case. It notes that

"[t]he Baldus study statistical evidence does not purport to show that McCleskey was sentenced to death because of either his race or the race of his victim." Id. at 895. And its ultimate conclusion is that:

> [t]he statistics alone are insufficient to show that McCleskey's sentence was determined by the race of his victim, or even that the race of his victim contributed to the imposition of the penalty in his case.
>
> McCleskey's petition does not surmount the threshold burden of stating a claim on this issue. Aside from the statistics, he presents literally no evidence that might tend to support a conclusion that the race of McCleskey's victim in any way motivated the jury to impose the death sentence in his case.

Id. at 898.

The same or similar principles lead the Court of Appeals to announce at least two additional major holdings. First, "assuming arguendo ... that the 20% disparity [in midrange cases like petitioner's] is an accurate figure," id. at 898, the Court holds that "a disparity only in the midrange cases, and not in the system as a whole, cannot provide the basis for a systemwide challenge.... A valid system challenge cannot be made only against the midrange of cases." Id. Second, the Court holds that "a court faced with a request for an evidentiary hearing to produce future studies" on racial discrimination need not grant a hearing unless there is evidence that "a particular defendant was discriminated against because of his race," something the Court admits that "general statistical studies ... do not even purport to prove." Id. at 894.

B. Petitioner's Giglio Claim

Petitioner McCleskey was convicted and sentenced to death for his part in an armed robbery of the Dixie Furniture Company in Atlanta, and the murder of police officer Frank Schlatt during the course of that robbery. Four robbers entered the store. When Officer Schlatt, summoned by a silent alarm, came in through the front door, he was shot and killed. Shortly after the crime, petitioner confessed to participating in the robbery but insisted he had not fired the fatal shots.

Two witnesses at petitioner's trial asserted that petitioner had admitted shooting the officer. One was Ben Wright, a co-defendant -- himself a possible suspect in the shooting. The other was Officer Evans, a federal prisoner who had been incarcerated with McCleskey prior to trial. Evans told the jury that McCleskey had confessed to shooting Officer Schlatt, and had said he would have done the same thing if it had been twelve police officers. Evans' testimony was the centerpiece of the prosecutor's argument to the jury that McCleskey committed the shooting with malice. (R. 1222).

At the time of his testimony, Evans was under federal escape charges. An Atlanta Police Department detective had promised Evans that he would "speak a word" to the federal authorities for Evans in return for Evans' testimony againt McCleskey. St. Hab. Tr. at 122, quoted in App. A., 753 F.2d at 883. After McCleskey's trial, McCleskey's prosecutor advised federal officials of Evans' cooperation, and the escape charges were dropped. Id.

The District Court below found that Evans' trial testimony concerning his understanding with the Atlanta police was false and evasive. The misleading testimony began as follows:

> Q: You do have an escape charge still pending, is that correct?

A: Yes, sir. I've got one, but really it ain't no escape, what the peoples out there tell me, because something went wrong out there so I just went home. I stayed at home and when I called the man and told him that I would be a little late coming in, he placed me on escape charge and told me there wasn't no use of me coming back, and I just stayed on at home and he come and picked me up.

Q: Are you hoping that perhaps you won't be prosecuted for that escape?

A: Yeah, I hope I don't but I don't -- what they tell me, they ain't going to charge me with escape no way.

(Trial Tr. 868-68). Evans thus described his escape from a federal halfway house in Atlanta as nothing more than a misunderstanding between himself and the halfway house administrators --nothing for which Evans feared or need fear prosecution. His testimony on this point is directly contradicted by federal records detailing the circumstances surrounding the escape.[35] He was asked specifically by the prosecutor whether he had sought or received from the prosecutor any promises concerning the escape charge, and he said no. As the District Court found, the jury was left with the impression from Evans' testimony that no promises had been made to him concerning the escape charge in exchange for his cooperation in the McCleskey prosecution. (R. 1220). His testimony on direct examination in the trial court was as follows:

Q: [Assistant District Attorney] Have you asked me to try to fix it so you wouldn't get charged with escape?

A: No, sir.

Q: Have I told you I would try to fix it for you?

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[35] Those records show that Evans had been told by federal personnel that disciplinary measures would be taken against him because of his use of drugs. In describing his activities during his escape, Evans had told federal prison authorities that he had gone to Florida as part of an investigation dealing with drugs, and that he expected to be well paid for his part. (R. 333, R. 1206).

A: No, sir.

(Trial Tr. 868-69). And on cross-examination Evans expanded upon these protestations:

> Q: Okay. Now, were you attempting to get your escape charges altered or at least worked out, were you expecting your testimony to be helpful in that?
>
> A: I wasn't worrying about the escape charge. I wouldn't have needed this for that charge, there wasn't no escape charge.

(Trial Tr. 882). That testimony was directly contradicted by Evans' subsequent testimony in State habeas corpus proceedings that "the Detective told me that he would -- he said he was going to do it himself, speak a word for me. That was what the Detective told me." (St. Hab. Tr. at 122).

C. Petitioner's Claim Under Sandstrom v. Montana and Francis v. Franklin

During its charge to the jury at the close of the guilt-or-innocence phase of petitioner's trial, the trial court instructed the jury as follows:

> One section of our law says that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound mind is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted.

(Trial Tr. 996-97).[36]

[36] The full instructions appear in the District Court's opinion. App. B., 580 F. Supp. at 384-85 n.21.

After approximately two hours of deliberations, the jury returned to the courtroom and requested the trial court to give them further instructions on malice. (Trial Tr. 1007-09). The trial court then repeated his initial instructions on that element of the crime. (Id).

D. Petitioner's Death-Qualification Claim

During voir dire, at least two prospective jurors, Ms. Barbara Weston and Mrs. Emma Cason, were excluded by the State for cause because of their conscientious or religious scruples against the death penalty, although neither stated that their views would preclude them from fairly judging petitioner's guilt or innocence. (Trial Tr. 98-99; 129-30).[37] Defense counsel made timely objection to the exclusion of both jurors. (Trial Tr. 98, 130).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

A. Petitioner McCleskey alleged in his federal habeas corpus petition, filed in the District Court on December 30, 1981, that "[t]he death penalty is in fact administered and applied arbitrarily, capriciously and whimsically in the State of Georgia, and petitioner was sentenced to die and will be executed pursuant to a pattern of wholly arbitrary and capricious infliction of that penalty in violation of ... the Eighth and Fourteenth Amendments." (Fed. Habeas Pet. ¶ 45). He also alleged that "[t]he death penalty is imposed in this case pursuant to a pattern and practice ... to discriminate on the grounds of race

[37] The full voir dire of each prospective juror appears in the District Court's opinion. App. B., 580 F. Supp. at 395 n.33.

... in the administration of capital punishment ... [in violation of] the Eighth Amendment and the due process and equal protection clauses of the Fourteenth Amendment." (Fed. Habeas Pet. ¶ 51).

The District Court held that "the Eighth Amendment issue has been resolved adversely to [petitioner] in this circuit," based upon prior precedent, App. B., 580 F. Supp. at 346. It rejected petitioner's Fourteenth Amendment claim after extensive discussion on the ground that "petitioner's statistics do not demonstrate a prima facie case." Id. at 379.

On appeal, petitioner contended that in rejecting his Eighth Amendment claim, the District Court "misread both Gregg v. Georgia, [428 U.S. 153 (1976)] ... and Furman v. Georgia, 408 U.S. 238 (1972), upon which Gregg is grounded." (En Banc Brief at 25). Petitioner also maintained that his "comprehensive statistical evidence on the operation of Georgia's capital statutes ... constitutes just the sort of 'clear pattern, unexplainable on grounds other than race,' Arlington Heights v. Metropolitan Housing Authority, 429 U.S. 252, 266 (1977), that the Supreme Court has held to establish an Equal Protection violation." (En Banc Brief at 27). The Court of Appeals, as noted earlier, held that, even assuming the validity of petitioner's evidence, it would not suffice to prove an Eighth or Fourteenth Amendment violation. See App. A., 753 F.2d at 886-87.

B. Petitioner alleged in his federal habeas petition that "[t]he State's deliberate failure to disclose an agreement or understanding between the State and the jail inmate Offie Evans ... violated the due process clause of the Fourteenth Amendment. (Fed. Habeas Pet. ¶ 15). The District Court granted relief on this claim, holding that the "disclosure of the promise of favorable treatment and correction of the other falsehoods in

Evans' testimony could reasonably have affected the jury's verdict on the charge of malice murder." App. B., 580 F. Supp. at 384.

On appeal, petitioner defended the propriety of the District Court's ruling under the Due Process Clause. (En Banc Brief, 9-15). The Court of Appeals reversed, reasoning that "(1) there was no promise in this case, as contemplated by Giglio; and (2) in any event, had there been a Giglio violation, it would be harmless." App. A., 753 F.2d at 883.

C. Petitioner alleged in his federal habeas petition that "[t]he trial court's charge to the jury regarding presumption of intent contravened petitioner's due process rights under the Fourteenth Amendment." (Fed. Habeas Pet. ¶ 29). The District Court, conceding that "[t]he charge at issue ... is virtually identical to those involved in Franklin [v. Francis, 720 F.2d 1206 (11th Cir. 1983), aff'd, ____ U.S. ____, 53 U.S.L.W. 4495 (U.S. April 30, 1985)] and Tucker [v. Francis, 723 F.2d 1504 (11th Cir. 1984), vacated and reh'g en banc pending], chose "to follow Tucker v. Francis," rather than Franklin and concluded that "the instruction complained of ... created only a permissive inference." App. B., 580 F. Supp. at 387.

On appeal, petitioner contended that "[t]he jury instruction here created a mandatory presumption, and thus the District Court erred when it concluded that no Sandstrom violation was present." (En Banc Brief at 24). The Court of Appeals reasoned that "in the course of asserting his alibi defense McCleskey effectively conceded the issue of intent, thereby rendering the Sandstrom violation harmless beyond a reasonable doubt." App. A., 753 F.2d at 904.

D. Petitioner alleged in his federal habeas petition that "[t]he trial court improperly excused two prospective jurors without adequate examination of their views regarding capital

punishment in contravention of petitioner's Sixth, Eighth and Fourteenth Amendment rights." (Fed. Habeas Pet. ¶ 82). The District Court held that "[p]etitioner's argument that the exclusion of death-scrupled jurors violated his right to be tried by a jury drawn from a representative cross section of his community has already been considered and rejected in this circuit. Smith v. Balkcom, 660 F.2d 573, 582-83 (5th Cir. Unit B 1981)." App. B, 580 F. Supp. at 396.

On appeal, petitioner urged the Court of Appeals to reconsider its prior holding in light of Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983), and Keeten v. Garrison, 578 F. Supp. 1164 (W.D.N.C. 1984). (En Banc Brief at 70). The Court of Appeals declined to do so, remarking that "[w]hatever the merits of [Grigsby and Keeten], they are not controlling authority for this Court." App. A., 753 F.2d at 901.

REASONS FOR GRANTING THE WRIT

This case was dominated below by the petitioner's evidence that race continues to play a role in Georgia's capital sentencing system. We therefore turn first to the important legal issues related to petitioner's racial discrimination claim. Nevertheless, we commend to the Court's attention the additional constitutional questions posed by petitioner's case.

* * * *

No single national failing has more deeply tarnished the promise of our Constitution than our tortured history of tolerance for racial discrimination, especially in the administration of criminal justice. Whether embodied explicitly in the language of statutes -- slave codes, black codes, Jim Crow laws -- or reflected in customs and practices permitting "unjust and illegal discriminations between persons in similar circumstances, material to their rights," Yick Wo v. Hopkins, 118 U.S. 356, 374

(1886), the official acceptance of different treatment of persons according to their race has compromised everything we as a nation profess about equal justice under law.

In the past three decades, the nation has, by addressing its racial problems, achieved subtantial progress toward ridding our public life of the taint of racial injustice. Our hardwon achievements have come only when we have summoned the collective will to face facts, and deal directly with the hard problems posed by those facts.

At the time of Furman v. Georgia, 408 U.S. 238 (1972), this Court appeared deeply troubled by the perception, "based on ... almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty," 408 U.S. at 313 (White, J., concurring), that America's capital punishment statutes, though fair on their face, were in practice so pervasively infected with racial bias that the death sentence was "wantonly and ... freakishly imposed." 408 U.S. at 310 (Stewart, J., concurring). The decision in Furman gave states an opportunity to fashion new laws, statutes that all hoped might "minimize the risk of wholly arbitrary and capricious" sentencing. Gregg v. Georgia, supra, 428 U.S. at 188. When in 1976, the Court upheld the new laws on their face, it did so on the assumption that their procedures would suffice to eliminate old problems. To indulge that assumption was appropriate: state statutes properly come before the Court with a strong presumption of constitutionality, and the Court -- as Justice White wrote -- was therefore unwilling "to interfere with the manner in which Georgia has chosen to enforce such laws on what is simply an assertion of a lack of faith in the ability of the system of justice to operate in a fundamentally fair manner." Gregg v. Georgia, supra, 428 U.S. at 226 (White, J., concurring in the judgment).

Petitioner McCleskey now brings before the Court something profoundly different from a mere "assertion of a lack of faith." Through the work of Professor Baldus and his colleagues, petitioner has adduced proof that, despite Georgia's revised procedures, race continues to play an important part in determining which Georgia capital defendants will live and which will die. Baldus' studies constitute the most thorough and illuminating research into capital sentencing undertaken in this generation. Their message is unequivocal: the influence of race is real, it is persistent, and it operates as powerfully as many of Georgia's statutory aggravating circumstances.

The opinion of the Court of Appeals below assumes petitioner's studies to be valid. It thus accepts that racial factors are systematically at work in Georgia's capital system, determining life and death. Yet it declares that the Constitution remains unimplicated by these facts. In reaching this extraordinary conclusion, the Court of Appeals articulates several principles that independently warrant certiorari, among them: (i) that Eighth Amendment claims of racial discrimination and arbitrariness must hereafter be accompanied by proof of specific intent or motive; (ii) that condemned inmates challenging racial discrimination in the administration of a state's capital sentencing system must produce, as part of their prima facie case, statistical proof so strong that it not only "compels a conclusion" of discriminatory intent but addresses every possible sentencing variable so as to establish that "purposeful discrimination ... can be presumed to permeate the system" and to have motivated the actors involved in each particular case; and (iii) that future factual hearings will not be warranted by "generalized statistical studies," no matter how powerful, unless they can demonstrate that the particular inmate's death sentence was brought about by conscious racial bias.

The Court should grant certiorari to examine each of these subtantial departures from prior law. But more fundamentally, review is warranted to determine whether the Court below, by erecting artificially high burdens of proof and barriers to relief, has effectively closed off the troubling subject of racial discrimination from appropriate constitutional review. A full examination of petitioner's charges of racial discrimination in Georgia's capital sentencing system would not be painless; but in the long run it would prove more healthy, and more consistent with our constitutional commitment to equal justice under law, than avoiding the problem by refusing to see it.

This country's interests would not be well served by another Plessy v. Ferguson; the administration of capital statutes cannot afford a second Dred Scott. Yet at bottom, the holding in McCleskey v. Kemp appears to be just that: systematic racial discrimination in capital sentencing -- at least some level of discrimination -- can and will be tolerated. The jurisdiction of this Court extends to very few questions more important than this one.

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A CONDEMNED INMATE WHO CAN DEMONSTRATE SYSTEMATIC RACIAL DIFFERENCES IN CAPITAL SENTENCING OUTCOMES MUST ALSO PROVE SPECIFIC INTENT OR PURPOSE TO DISCRIMINATE IN ORDER TO ESTABLISH AN EIGHTH AMENDMENT VIOLATION

The primary focus of this Court's Eighth Amendment concern in capital cases has always been upon the results of the sentencing process: the Eighth Amendment is violated if "there is no meaningful basis for distinguishing the few cases in which [capital punishment] ... is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. 238, 313 (1972) (White,

J., concurring); id. at 256 (Douglas, J., concurring) ("[t]he high service rendered by the 'cruel and unusual' punishment clause ... is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups").

Such a focus is natural, for the arbitrariness and capriciousness condemned in Furman are inherently deficiencies that can afflict a system irrespective of conscious choice or decision: to be "struck by lightning is cruel and unusual," Furman v. Georgia, supra, 408 U.S. at 309 (Stewart, J., concurring), regardless of whether one posits a malevolent deity or an indifferent universe.

Even when the Court's attention has turned toward matters of procedure, the ultimate aim has been to require procedures that will "minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell & Stevens, JJ.). Accord Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell & Stevens, JJ.); Lockett v. Ohio, 438 U.S. 586, 601 (1978) (plurality opinion); Beck v. Alabama, 447 U.S. 625, 637-38 (1980); Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). The Eighth Amendment burden to ensure evenhanded sentencing outcomes rests clearly on the State: "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

The Court of Appeals has now held that proof of arbitrary and capricious results are no longer sufficient to invoke Eighth Amendment protection -- at least if that caprice takes the form of racial discrimination. The Court acknowledges that "cruel and

unusual punishment cases do not normally focus on the intent of the governmental actor," App. A., 753 F.2d at 892, yet it reasons that where racial discrimination is the gravamen of a condemned inmate's complaint, intent and motive are a "natural component" of the proof that discrimination actually occurred. Id. Nothing in this Court's Eighth Amendment caselaw suggests that such a component is a necessary element of "a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman." Gregg v. Georgia, supra, 428 U.S. at 195 n.46 (opinion of Stewart, Powell & Stevens, JJ.). To the contrary, Justice Douglas in Furman expressly disclaimed the impossible "task ... [of] divin[ing] what motives impelled these death penalties." Furman v. Georgia, supra, 408 U.S. at 253. And the Court in Godfrey surely did not insist upon convicting either Godfrey's jury or the Georgia Supreme Court of conscious discriminatory animus.

The evil against which the Eighth Amendment as construed in Furman and its progeny seeks to guard is the unequal treatment of equals in the most important sentencing decision our society permits. Petitioner's studies have found that race plays an independent role in cases that are otherwise equal, after chance and over 230 other factors have been taken into account. Locating precisely where and how, consciously or unconsciously, race is influencing the literally thousands of actors involved in capital sentencing -- prosecutors, judges, jurors who assemble to make a single decision in a single case, only to be replaced by other jurors in the next case, and still others after them -- is manifestly impossible. Yet "[i]dentified or unidentified the results of the unconstitutional ingredient of race, at a significant level in the system, is the same on the black defendant. The

inability to identify the actor or agency has little to do with the constitutionality of the system." 753 F.2d at 919. (Hatchett, J., dissenting in part and concurring in part).

The Court should therefore grant certiorari to determine whether proof of discriminatory intent is necessary to establishing an Eighth Amendment claim when substantial racial disparities in sentencing outcome have been proven by petitioner and assumed by the Court of Appeals.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXTRAORDINARY STANDARD OF PROOF IMPOSED BY THE COURT OF APPEALS IN CASES INVOLVING STATISTICAL EVIDENCE OF DISCRIMINATION IN CAPITAL SENTENCING CONFLICTS WITH PRIOR DECISIONS OF THIS COURT OR THOSE OF OTHER CIRCUITS

In Washington v. Davis, 426 U.S. 229 (1976), and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), the Court held that under the Fourteenth Amendment, "official action will not be held unconstitutional solely because it results in a racially disproportionate impact.... Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Arlington Heights, supra, 429 U.S. at 265-66. See, e.g., Hunter v. Underwood, ____ U.S. ____, 53 U.S.L.W. 4468, 4469 (U.S., April 16, 1985). Nevertheless, as Justice Stevens noted, "the burden of proving a prima facie case may well involve differing evidentiary considerations" depending upon the factual context in which the claim arises. Washington v. Davis, supra, 426 U.S. at 253. (Stevens, J., concurring). "[I]n the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation ... [i]t [would be] unrealistic ... to require the victim of alleged discrimination

to uncover the actual subjective intent of the decisionmaker." Id. Accord Arlington Heights, supra, 429 U.S. at 265; Hunter v. Underwood, supra, 53 U.S.L.W. at 4469.

In such contexts, the Court has demanded "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights, supra, 429 U.S. at 266. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact ... may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." Washington v. Davis, supra, 426 U.S. at 242. In a series of related cases, the Court has stressed the central role that statistical evidence may play in proving discriminatory intent. See, e.g., Hazelwood School District v. United States, 433 U.S. 299, 307 (1977); (Title VII case: "[w]here gross statistical disparities can be shown, they alone in a proper case constitute prima facie proof of a pattern or practice of discrimination"); Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620 (1973) (equal protection case: "statistical analyses have served and will continue to serve an important role as one indirect indicator of racial discrimination ..."). See also Castaneda v. Partida, 430 U.S. 482, 493-94 (1977).

The lower federal courts on whole have followed this Court's lead, admitting statistical evidence on the issue of discriminatory intent in a wide variety of appropriate contexts. See, e.g., EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983); Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. 1981), vacated and remanded on other grounds, 459 U.S. 809 (1982); EEOC v. Ball Corp., 661 F.2d 531 (6th Cir. 1981); Coble

v. Hot Springs School Distict No. 6, 682 F.2d 721 (8th Cir. 1982); Eastland v. TVA, 704 F.2d 613 (11th Cir. 1983); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984); Vuyanich v. Republic Nat'l Bank, 505 F. Supp. 224 (N.D. Tex. 1980), vacated on other grounds, 723 F.2d 1195 (5th Cir. 1984).

This Court has also outlined an appropriate order of proof in those cases in which discriminatory intent is at issue. The plaintiff is initially required to present a prima facie case, establishing discrimination by a preponderance of the evidence. The defendant may then explain or justify its conduct, or may seek to discredit the plaintiff's proof. Finally, the plaintiff may reply to the defendant's rebuttal, showing that the defendant's justifications or explanations do not defeat the inference of intent. See, e.g., Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

The Court of Appeals' opinion in this case is, to say the least, deeply inhospitable toward this Court's major teachings on the use of statistical evidence and on the appropriate uses of such evidence to establish a prima facie case. It is, moreover, inconsistent with the very concept of a prima facie case. For if, as the Court of Appeals held, a prima facie case of discrimination must be so overwhelming as to "compel a conclusion" of discriminatory intent -- if, as the Court of Appeals also held, it must anticipate and dispel in advance every merely possible non-racial explanation -- then the so-called "prima facie" case is logically irrebutable and required to be so.

The Court of Appeals' decision is also in direct conflict with many of the lower court decisions interpreting this Court's teachings. The lower federal courts, in statistical cases, have developed a series of criteria for establishing a prima facie

case of discriminatory intent. They have been virtually unanimous that a standard of perfection is neither attainable nor required.

> "[A] plaintiff's initial proof must be measured against the more generalized function standard that the Supreme Court has elaborated in Teamsters v. [United States, 431 U.S. 324 (1977)] ... at 358; Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978) and Burdine, supra, 450 U.S. at 253-254. These cases hold that a sufficient prima facie case is made out when the plaintiff shows a disparity in the relative position or treatment of the minority group and has eliminated 'the most common nondiscriminatory reasons for the observed disparity.' Burdine, supra, 450 U.S. at 253-254."

Segar v. Smith, supra, 738 F.2d at 1273. See e.g., Vuyanich v. Republic Nat'l Bank, supra, 505 F. Supp. at 273-74.

Realistically, the standard of proof to which the Court of Appeals held petitioner is beyond the power of any party to meet. Minor refinements of Baldus' studies are certainly possible. A study that would, however, (i) account for every conceivable nonracial influence; (ii) eliminate all random factors; (iii) identify every malevolent actor; and (iv) demonstrate the quantitative impact of racially invidious intent on each condemned inmate's case, is simply not possible. The Court of Appeals offered no real justification for setting petitioner's burden so high; it is as if the Court inexplicably determined flatly to foreclose any further racial challenges to the application of capital statutes. Whether so meant or not, the opinion will undoubtedly have precisely that effect in practice.

The Court of Appeals' opinion reads more generally, however. The opinion does not purport to limit itself to capital cases: its potential reach appears to include all equal protection cases based upon statistical evidence. Yet its announced standards of proof conflict with virtually every other decided case involving

claims of racial discrimination. If racial discrimination in capital sentencing ought to be judged by the same standards applicable in other areas, this Court should grant certiorari to review an opinion so fundamentally out of line with dozens of circuit court decisions, and with the many opinions of this Court explicating the proper burden of proof for a party attempting to demonstrate discrimination.

If, on the other hand, racial discrimination in capital punishment is to be judged by some standard dramatically more strict than that applicable in other areas of the law, the Court should grant certiorari to say so clearly, and to explain the constitutional basis for such a distinction.

III.

THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE COURT OF APPEALS' HOLDING THAT THE STATE'S NONDISCLOSURE OF AN INFORMAL PROMISE OF FAVORED TREATMENT DOES NOT IMPLICATE THE DUE PROCESS REQUIREMENT OF GIGLIO V. UNITED STATES

This case presents an important question of federal constitutional law on which, as the Court of Appeals noted, this Court has "never provided definitive guidance." App. A., 753 F.2d at 884). At issue is whether the due process clause, as interpreted by this Court in Napue v. Illinois, 360 U.S. 264 (1959), and Giglio v. United States, 405 U.S. 150 (1972), requires the State to correct false testimony of a key witness regarding the State's informal promises of favored treatment in exchange for the witness's testimony. Here, because the promise or understanding which existed between a police detective and the witness was an informal agreement, the Court of Appeals concluded that its nondisclosure to the jury did not infringe petitioner's due process rights. App. A., 573 F.2d at 884.

The Court of Appeals' decision on this question is contrary to that of a number of other circuits which have concluded that the due process clause is violated by the State's failure to correct false testimony regarding undisclosed promises of benefit, informal or tentative in nature. The rationale for the prevailing rule is stated in Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976). There, the Fourth Circuit considered the State's failure to correct false testimony regarding a promise by a police detective to "use his influence with the prosecuting attorney" regarding pending charges and concluded:

> [R]ather than weakening the significance for credibility purposes of an agreement of favorable treatment, tentativeness may increase its relevancy. This is because a promise to recommend leniency (without assurance of it) may be interpreted by the promisee as contingent upon the quality of the evidence produced -- the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor.

Id. at 451. Accord Campbell v. Reed, 594 F.2d 4, 6 (4th Cir. 1979) (witness was advised that "everything would be all right").

The other Circuit Courts which have considered this question have all adopted the same rule espoused by the Fourth Circuit in Boone. E.g., DuBose v. Lefebre, 619 F.2d 973, 977 (2d Cir. 1980) (prosecutor agreed to "do the right thing" for witness regarding pending indictment); Blanton v. Blackburn, 494 F.Supp. 895, 901 (M.D. La. 1980), aff'd, 654 F.2d 719 (5th Cir. Unit A. 1980) (imprecise agreements reached with four of five key witnesses); United States v. Bigeleisen, 625 F.2d 203, 205 (8th Cir. 1980) (prosecutor agreed to "make witness's cooperation known to authorities"); United States v. Butler, 567 F.2d 885, 888 (9th Cir. 1978) (agents told witness "they were going to do everything

they could to help him"). Chief Judge Godbold, writing in dissent below, urged adoption of a rule similar to that applied by the other circuits:

> The proper inquiry is not limited to formal contracts, unilateral or bilateral, or words of contract law, but "to ensure that the jury knew the facts that might motivate a witness in giving testimony.'

App. A., 753 F.2d at 907.

The Eleventh Circuit's contrary rule that false testimony regarding an informal agreement by a government agent does not invoke Giglio is also inconsistent with this Court's precedent. The benefit offered to the witness in Napue was no more formalized or certain than the benefit offered to the witness in the present case. The prosecutor[38] told the witness in Napue that "'a recommendation for a reduction of his ... sentence would be made and, if possible, effectuated." Napue v. Illinois, 360 U.S. at 266. Napue makes clear that the due process clause applies to situations other than those involving false testimony regarding formal, unqualified agreements.

[38] The Eleventh Circuit's description of the benefit offered to the witness as "marginal" in nature does not apparently refer to the fact that the promise was made by a police detective rather than a prosecutor. In Williams v. Griswald, 743 F.2d 1533 (11th Cir. 1984), the Eleventh Circuit has recently reaffirmed its long-standing rule, derived from this Court's decision in Pyle v. Kansas, 317 U.S. 213 (1942), that false testimony regarding a promise by a police officer contravenes the due process clause.

Napue, as well as the circuit court cases which have followed it, show that the informal nature of the promise to Offie Evans is not a basis for holding the due process clause inapplicable.[39] This Court should grant certiorari to resolve the conflict in the circuits on this issue.

Relying on the fact that the jury was advised that Evans had a prior criminal record, the Court of Appeals alternatively held that the failure to correct his false testimony about the nature and circumstances of the pending escape charge and the State's promises concerning it was harmless error. That decision places the Eleventh Circuit in conflict with the Second Circuit's ruling in Annunziato v. Manson, 566 F.2d 410, 414 (2nd Cir. 1977), that under Napue and Giglio, "the jury should be informed that the witness hopes for leniency on current charges and that the prosecution has a present leverage over the fate of the witness." Informing jurors of a witness's past crimes does not indicate to the jury his present motivation to lie, which is the underlying

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[39] A subsequent decision of the Eleventh Circuit suggests that the "McCleskey rule is that Giglio does not apply unless there is more than one criminal charge pending against the witness, and, since the witness herein was facing 'a lone escape charge,' the due process clause afforded no protection." Haber v. Wainwright, 756 F.2d 1520, 1524 n.7 (11th Cir. 1985). Of course, such a rule is contrary to the facts and underlying purposes of Napue and Giglio. In Napue, the witness was offered a recommendation for reduction of his "lone" murder charge; a witness may obviously have a motive to lie when promised leniency on a single charge pending against him.

Nor is the Court's characterization of the promise as "marginal" justified if it is meant to refer to the potential sentence that Evans faced because of the escape charge pending against him. That charge carried a potential sentence of 5 years imprisonment and/or a $5,000 fine. 18 U.S.C. § 751.

purpose of the Napue/Giglio line of cases.[40] Just as the Eleventh Circuit failed to recognize that an informal agreement with the State can provide a witness with a motive to lie, so it failed to recognize that under the due process clause, a jury must be apprised of false testimony which hid from the jury that motive to lie. Certiorari should also be granted on this aspect of the case.

IV.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER IMPORTANT, UNRESOLVED QUESTIONS REGARDING HARMLESS ERROR UNDER SANDSTROM V. MONTANTA AND FRANCIS V. FRANKLIN

A majority of the Court of Appeals properly concluded that the trial court's instruction on the presumption of intent in this case was unconstitutional.[41] It went on to hold, however, that "where the State has presented overwhelming evidence of an intentional killing and where the defendant raises a defense of nonparticipation in the crime rather than lack of mens rea, a

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[40] Again in dissent, Chief Judge Godbold noted the critical nature of witness Evans' testimony: "Co-defendant Wright was the only eyewitness. He was an accomplice, thus his testimony, unless corroborated, was insufficient [under Georgia law] to establish that McCleskey was the triggerman.... Evans is not a minor or incidental witness." Evans' testimony, describing what McCleskey "confessed to him, is the corroboration for the testimony of the only eyewitness, Wright." App. A., 753 F.2d at 907.

[41] The instruction given in petitioner's trial was indistinguishable from that found unconstitutional in Francis v. Franklin. The instruction reads, in relevant part:

> One section of our law says that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted.

App. B., 580 F. Supp. at 384 n.21 (emphasis omitted).

Sandstrom violation on an intent instruction such as the one at issue here is harmless beyond a reasonable doubt." App. A., 753 F.2d at 904.[42]

This decision squarely raises the basic question left open in Connecticut v. Johnson, 460 U.S. 73 (1983), Koehler v. Engle, ____ U.S. ____, 80 L.Ed.2d 1 (1984), and Francis v. Franklin, ____ U.S. ____, 53 U.S.L.W. 4495 (U.S., April 30 1985): whether a jury charge that unconstitutionally shifts a burden of persuasion to the defendant on an essential element of an offense can ever be harmless. The facts of the case present a second question of importance and general applicability deriving from the first: whether, if "harmless error" ever does excuse a Sandstrom violation, it can do so where the defendant chooses to put the prosecution to its proof on the issue of intent, without conceding or addressing evidence directly to that issue, because he undertakes primarily to establish a defense of nonparticipation.

Here the charge was malice murder: killing with the requisite intent. McCleskey denied that he was the killer. The prosecution sought to prove his identity as the killer by circumstantial evidence, coupled with suspect testimony from a co-defendant and a jailhouse inmate that McCleskey had admitted the killing to them. The victim, a police officer, was shot at some distance after he had entered and half-crossed the floor of a store with a robbery in progress. No one saw the shooting. See App. B., 580 F.Supp. at 382.

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[42] Judge Johnson, writing for the dissenting judges, noted that the facts did not support the characterization of the evidence against petitioner as "overwhelming." No one saw the shooting; the murder weapon was never recovered; the shooting did not occur at pointblank range; and the officer was moving at the time of the shooting. App. A., 753 F.2d at 918.

In this situation, the question of the killer's intent remained very much at issue, whether McCleskey was or wasn't the killer. The prosecutor made lengthy arguments to the jury on the evidence regarding intent. (Trial Tr., 974-75). Defense counsel countered with arguments that "the defense doesn't have to prove anything to you" (Trial Tr., 909) and that the State's witnesses were not credible. (Trial Tr., 911, 921, 936, 938-39, 943, 948-49, 951, 952). The jury was charged -- and then, at its request, returned for reinstruction -- on the elements of malice murder. (Trial Tr. 1007). Its job was to decide whether each of those elements, including intent, was established by the evidence beyond a reasonable doubt. However, the unconstitutional instruction deemed "harmless" by the Court of Appeals permitted the jury to find intent without considering the evidence.

Reference to the "overwhelming" weight of the evidence as a test of harmless error is therefore singularly inappropriate here. The jury might well have relied upon the presumption, rather than the evidence, to conclude that the petitioner was guilty of malice murder. As Justice Blackman indicated in Connecticut v. Johnson,

> [t]he fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant.

460 U.S. at 86. The present case provides an excellent vehicle for deciding whether the plurality opinion in Johnson or the majority opinion of the Court of Appeals below states the proper constitutional rule.

In any event, the Court of Appeals rendered its decision on the point without the benefit of this Court's opinion in Francis v. Franklin, ____ U.S. ____, 53 U.S.L.W. 4495 (U.S. April 30, 1985). In Francis, the Court recognized that the jury's return for reinstruction on the elements of malice and accident "lent

substance to the conclusion that the evidence of intent was far from overwhelming." Id. at 4500-01. Petitioner's jury, after approximately two hours of deliberation, also asked the trial court for further instructions on malice. The Court of Appeals made nothing of the fact. At the very least, this Court should accordingly grant the petition for certiorari, vacate the Court of Appeals' decision, and remand the case for reconsideration in light of Francis.

V.

THE COURT SHOULD GRANT CERTIORARI ON THE ISSUES COMMON TO THIS CASE, GRIGSBY V. MABRY, AND KEETEN V. GARRISON

In Witherspoon v. Illinois, 391 U.S. 510, 520 n.18 (1968), this Court reserved the question whether the exclusion for cause of prospective jurors who could fairly decide a capital defendant's guilt or innocence, solely because of their inability to consider the death penalty, might create a "jury ... less than neutral with respect to guilt." Since that time, after thorough evidentiary hearings, two federal district courts have found that such juries are in fact "guilt-prone" and unrepresentative in a Sixth Amendment sense, and that the exclusion of such jurors at the guilt phase of a bifurcated capital trial deprives a defendant of the constitutional rights to a fair jury and one drawn from a representative cross-section of the community. See Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983); Keeten v. Garrison, 578 F. Supp. 1164 (W.D.N.C. 1984). The Grigsby case was affirmed by the Eighth Circuit en banc. Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc). The Keeten case was reversed by a panel of the Fourth Circuit, Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984), and a certiorari petition to review the latter decision has been filed, O.T. 1984, No. 84-5187.

In its decision below, the Eleventh Circuit aligned itself with the Fourth Circuit's holding in Keeten and opposed itself to the Eighth Circuit's holding in Grigsby. This Court should grant certiorari to settle the conflict among the circuits.

CONCLUSION

The petition for certiorari should be granted.

Dated: May 28, 1985.

Respectfully submitted,

JULIUS L. CHAMBERS
JAMES M. NABRIT, III
* JOHN CHARLES BOGER
DEVAL L. PATRICK
99 Hudson Street
New York, New York 10013
(212) 219-1900

ROBERT H. STROUP
1515 Healey Building
Atlanta, Georgia 30303

TIMOTHY K. FORD
600 Pioneer Building
Seattle, Washington 98104

ANTHONY G. AMSTERDAM
New York University
School of Law
40 Washington Square South
New York, New York 10012

* ATTORNEY OF RECORD

ATTORNEYS FOR PETITIONER

BY: John Charles Boger
John Charles Boger

CERTIFICATE OF SERVICE

I hereby certify that I am attorney of record for petitioner Warren McCleskey, and that I served the annexed Petitioner for Certiorari and Motion for Leave to Proceed In Forma Pauperis on respondent by placing copies in the United States mail, first class mail, postage prepaid, addressed as follows:

Mary Beth Westmoreland, Esq.
Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

All parties require to be served have been served.

Done this 28 day of May, 1985.

John Charles Boger
JOHN CHARLES BOGER

84-6811

No. 84-____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

WARREN McCLESKEY,

Petitioner,

-against-

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S APPENDICES

JULIUS L. CHAMBERS
JAMES M. NABRIT, III
* JOHN CHARLES BOGER
DEVAL L. PATRICK
99 Hudson Street
New York, New York 10013
(212) 219-1900

ROBERT H. STROUP
1515 Healey Building
Atlanta, Georgia 30303

TIMOTHY K. FORD
600 Pioneer Building
Seattle, Washington 98104

ANTHONY G. AMSTERDAM
New York University
School of Law
40 Washington Square South
New York, New York 10012

* COUNSEL OF RECORD

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

Appendix A -

Opinion of the United States Court of Appeals for the Eleventh Circuit in McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc)

constituted ineffective assistance of counsel.

Id. at 1240.

The Court accordingly finds that Petitioner's claim of restriction of non-statutory mitigating factors has been previously raised and adjudicated on the merits. Reconsideration of this claim may be barred pursuant to Rule 9(b) and the first branch of the *Sanders* doctrine unless the ends of justice would thereby be defeated.

The Court finds that Petitioner had a full and fair opportunity to present this argument at the time of litigating the second habeas petition. The facts upon which this claim is based were known to Petitioner at the time the second petition was filed because Petitioner relied upon the transcript of the first sentencing hearing in setting forth the ineffective assistance of counsel claim. No justification exists for failing to make this argument in the prior habeas petitions.

In addition, the Court finds that the law of the case doctrine precludes relitigation of this claim because, as previously noted, the Eleventh Circuit held in *Rauleerson v. Wainwright*, 732 F.2d 803, 810 (11th Cir. 1984) that challenges to the first sentencing proceeding are irrelevant in a petition for relief from a sentence imposed at the second sentencing proceeding. Again, this decision was not clearly erroneous and would not work a manifest injustice in this case.

In conclusion, the Court notes that, with the exception of one witness' testimony, the gist of the evidence introduced at the hearing on abuse of the writ sought to establish excusable neglect or the absence of deliberate bypass in failing to raise the present claims in the prior petition. However, this Court has concluded that all of Petitioner's claims were indeed raised in the previous habeas petition. Thus, the first branch, rather than the second branch, of the *Sanders* doctrine applies.

Accordingly, it is

ORDERED and ADJUDGED:

1. That the Petition for Writ of Habeas Corpus, filed herein on January 23, 1985, is hereby DENIED;

2. That the Motion for a Stay of Execution, filed herein on January 23, 1985, is hereby DENIED;

3. In light of the Court's rulings, the Petitioner's Emergency Motion for Immediate Hearing filed on January 26, 1985, Motion and Authorities for Evidentiary Hearing filed on January 23, 1985, Motion for Leave to Take Depositions of Out of State Witnesses filed on January 23, 1985, and Supplemental Motion filed on January 27, 1985, are hereby rendered MOOT.

Warren McCLESKEY,
Petitioner-Appellee,
Cross-Appellant,

v.

Ralph KEMP, Warden,
Respondent-Appellant,
Cross-Appellee.

No. 84-8176.

United States Court of Appeals,
Eleventh Circuit.

Jan. 29, 1985.

After defendant's convictions and sentences for murder on two counts of armed robbery were affirmed by the Georgia Supreme Court, 245 Ga. 108, 263 S.E.2d 146, he petitioned for habeas corpus relief. The United States District Court for the Northern District of Georgia, J. Owen Forrester, J., 580 F.Supp. 338, granted habeas corpus relief, but concluded that defendant failed to support his claim that Georgia death-sentencing process was unconstitutional. Both defendant and state appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) state's nondisclosure of du-

tective's statement to prisoner who testified that defendant made a jailhouse confession did not violate defendant's due process rights; (2) proof of a disparate impact alone is insufficient to invalidate a capital sentencing system; (3) fact that on average a white victim crime is six percent more likely to result in death sentence than a comparable black victim crime was not sufficient to overcome presumption that Georgia death-sentencing process is operating in a constitutional manner; (4) statistical study was insufficient to show that defendant's sentence was determined by race of his victim; (5) defendant failed to establish ineffective assistance of counsel; and (6) in course of asserting his alibi defense, defendant effectively conceded issue of intent, thus rendering erroneous burden-shifting instruction on intent harmless beyond a reasonable doubt.

Reversed and rendered.

Tjoflat and Vance, Circuit Judges, concurred with opinions.

Kravitch, Circuit Judge, issued concurring statement.

R. Lanier Anderson III, Circuit Judge, concurred with opinion in which Kravitch, Circuit Judge, joined as to the constitutional application of the Georgia Death Statute.

Godbold, Chief Judge, dissented in part and concurred in part with opinion in which Johnson, Hatchett and Clark, Circuit Judges, joined as to the dissent in the *Giglio* issue.

Johnson, Circuit Judge, dissented in part and concurred in part with opinion in which Hatchett and Clark, Circuit Judges, joined.

Hatchett and Clark, Circuit Judges, dissented in part and concurred in part with opinions.

1. **Constitutional Law** ⇐268(9, 10)

State violates due process when it obtains a conviction through use of false evidence or on basis of a witness' testimony when that witness has failed to disclose a promise of favorable treatment from prosecution. U.S.C.A. Const.Amends. 5, 14.

2. **Criminal Law** ⇐700(4)

Purpose of rule requiring disclosure of a promise of favorable treatment as a reward for his testimony is to ensure that a jury knows the facts that motivate witness in giving testimony.

3. **Constitutional Law** ⇐268(10)

State's nondisclosure of statement of detective to witness that detective would "speak a word" for him did not infringe defendant's due process rights, since statement offered such a marginal benefit that it was doubtful it would motivate a reluctant witness, or that disclosure of statement would have had any effect on his credibility. U.S.C.A. Const.Amends. 5, 14.

4. **Criminal Law** ⇐1171.1(1)

Even if state's failure to disclose detective's cryptic statement to witness that he would "speak a word" for him or to disclose witness' inconsistent version of escape constituted a violation of defendant's due process rights, error was harmless, since it was unlikely that undisclosed information would have affected jury's assessment of witness' credibility. U.S.C.A. Const.Amends. 5, 14.

5. **Criminal Law** ⇐519

Under Georgia law, an accomplice's testimony alone in felony cases is insufficient to establish a fact. O.C.G.A. § 24-4-8.

6. **Criminal Law** ⇐511.1(4)

Corroboration of accomplice's testimony need not extend to every material detail.

7. **Criminal Law** ⇐552.1(1)

In evidentiary terms, statistical studies based on correlation are circumstantial evidence; they are not direct evidence.

8. **Criminal Law** ⇐1208.1(4)

Limited circumstances under which statistical evidence alone can establish intentional racial discrimination in the imposition of capital sentence is where the statistical evidence of racially disproportionate impact is so strong as to permit no inference other

than that the results are the product of a racially discriminatory intent or purpose.

9. Criminal Law ⇐388

Statistical evidence may be presented in the trial court through direct testimony and cross-examination of statistical information that bears on an issue.

10. Criminal Law ⇐1213.8(8)

A successful Eighth Amendment challenge, based on race, to a capital sentencing system would require proof that the race factor is operating in the system in such a pervasive manner that it could fairly be said that system is irrational, arbitrary and capricious. U.S.C.A. Const.Amend. 8.

11. Constitutional Law ⇐270(1)

Where a capital sentencing statute is facially neutral, a due process claim based on race must be supported by proof that a state, through its prosecutors, jurors, and judges, has implicitly attached an aggravating label to race. U.S.C.A. Const.Amends. 5, 14.

12. Constitutional Law ⇐251

Application of the due process clause is an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake. due process also requires the assessment of the risk that the procedures being used will lead to erroneous decisions. U.S.C.A. Const.Amends. 5, 14.

13. Constitutional Law ⇐270(2)

With regard to a claim that a capital-sentencing process violates due process because of a race factor, claimant must present evidence which establishes that in the process race is a motivating factor in the decision. U.S.C.A. Const.Amends. 5, 14.

14. Criminal Law ⇐986.2(1)

Where racial discrimination is claimed with regard to sentencing process, not on basis of procedural faults or flaws in the structure of the law, but on the basis of the decisions made within that process, then purpose, intent and motive are a natural component of the proof that discrimination actually occurred.

15. Constitutional Law ⇐215

With regard to a constitutional claim of racial discrimination, a showing of disproportionate impact alone is not sufficient to prove requisite discriminatory intent unless no other reasonable inference can be drawn.

16. Criminal Law ⇐1208.1(4)

Proof of a disparate impact alone is insufficient to invalidate a capital sentencing system, unless that disparate impact is so great that it compels conclusion that the system is unprincipled, irrational, arbitrary and capricious such that purposeful discrimination, i.e., race is intentionally being used as a factor in sentencing, can be presumed to permeate the system.

17. Criminal Law ⇐1208.1(4)

With regard to claim of racial disparity in application of a state's death penalty, statistical studies may reflect a disparity so great as to inevitably lead to a conclusion that the disparity results from discriminatory intent or motivation.

18. Criminal Law ⇐1158(1)

Findings of fact are reviewed under the clearly-erroneous standard.

19. Criminal Law ⇐1158(1)

Whether a disparate impact reflects an intent to discriminate is an ultimate fact which must be reviewed under the clearly-erroneous standard.

20. Criminal Law ⇐1208.1(4)

Fact that on average a white victim crime is six percent more likely to result in a death sentence than a comparable black victim crime was not sufficient to overcome presumption that Georgia capital sentencing system is operating in a constitutional manner.

21. Criminal Law ⇐1208.1(4)

Assuming that statistical study was accurate in its conclusion that a white victim increased likelihood of death penalty by approximately 20 percent in midrange

cases, such a disparity did not provide basis for systemwide challenge to Georgia capital-sentencing process, since system as a whole is operating in a rational manner, and not in a manner that can fairly be labeled arbitrary or capricious.

22. **Criminal Law** ⇐986.2(1)

Statistical study showing that, on average, race-of-the-victim factor was more likely to affect outcome in midrange cases than in those cases at high and low ends of the spectrum of aggravation was insufficient to show that defendant's sentence was determined by race of his victim or even that race of victim contributed to imposition of the penalty.

23. **Criminal Law** ⇐1166.11(5)

Ineffective assistance of counsel warrants reversal of a conviction only when there is a reasonable probability that the attorney's errors altered the outcome of the proceeding.

24. **Criminal Law** ⇐641.13(1)

A court may decide an ineffectiveness of counsel claim on ground of lack of prejudice without considering reasonableness of attorney's performance.

25. **Criminal Law** ⇐1166.11(5)

Defendant failed to demonstrate prejudice caused by counsel's failure to interview prisoner who testified that defendant gave a jailhouse confession, with regard to detective's statement to prisoner, since there was no reasonable probability that counsel's failure to discover such evidence affected the verdict.

26. **Criminal Law** ⇐1166.11(5)

Defendant failed to establish that he was prejudiced by counsel's failure to interview victims of robbery, in absence of contention that an in-person interview would have revealed something their statements did not; moreover, defendant had an opportunity to cross-examine several of the robbery victims at his preliminary hearing.

27. **Criminal Law** ⇐641.13(6), 1166.11(5)

Counsel's failure to subpoena victims of robbery as defense witnesses did not constitute ineffective assistance of counsel, where counsel relied primarily on alibi defense at trial, and it would have undermined his defense if he had called the victims to testify as to which robber did the shooting; moreover, no prejudice could be shown by failing to subpoena the witnesses.

28. **Criminal Law** ⇐641.13(6)

Attorney's failure to interview state's ballistics expert did not constitute ineffective assistance of counsel, since attorney could have reasonably prepared to cross-examine state's expert by reading expert's report in prosecutor's file; no in-person interview was necessary.

29. **Criminal Law** ⇐641.13(6)

Where attorney talked with both defendant and his sister about potential character witnesses who would testify at sentencing phase, they suggested no possibilities, and sister refused to testify and advised attorney that their mother was too sick to travel to site of trial, attorney conducted reasonable investigation for character witnesses.

30. **Criminal Law** ⇐641.13(6)

With regard to ineffective assistance of counsel claim based on failure of counsel to object to state's introduction of three convictions resulting in life sentences, all of which were set aside on Fourth Amendment grounds, evidence did not result in any undue prejudice, because although convictions were overturned, charges were not dropped and defendant pleaded guilty and received sentences of 18 years, a reduction in sentence which was disclosed at trial. U.S.C.A. Const.Amend. 4.

31. **Jury** ⇐33(2.1), 108

Jurors who indicated that they would not, under any circumstances, consider imposing the death penalty were properly excluded, and such exclusion did not violate defendant's Sixth Amendment rights to an impartial, community-representative jury. U.S.C.A. Const.Amend. 6.

32. Criminal Law ⇐1172.2

An erroneous burden-shifting instruction may have been harmless if evidence of guilt was so overwhelming that error could not have contributed to jury's decision to convict.

33. Criminal Law ⇐1172.6

An erroneous burden-shifting instruction may be harmless where instruction shifts burden on an element that is not an issue at trial.

34. Criminal Law ⇐308

A defendant in a criminal trial may rely entirely on presumption of innocence and state's burden of proving every element of the crime beyond a reasonable doubt.

*35. Criminal Law ⇐1172.2

Erroneous burden-shifting instruction concerning intent was harmless beyond a reasonable doubt, considering that defendant in course of asserting his alibi defense effectively conceded issue of intent.

36. Criminal Law ⇐1172.2

Where the state has presented overwhelming evidence of an intentional killing and where defendant raises a defense of nonparticipation in the crime rather than lack of mens rea, a *Sandstrom* violation on an intent instruction is harmless beyond a reasonable doubt.

Mary Beth Westmoreland, Asst. Atty. Gen., Atlanta, Ga., for respondent-appellant, cross-appellee.

Robert H. Stroup, Atlanta, Ga., John Charles Boger, Anthony G. Amsterdam, New York University School of Law, New York City, for petitioner-appellee, cross-appellant.

Appeals from the United States District Court for the Northern District of Georgia.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, JAMES C. HILL, FAY, VANCE, KRAVITCH, JOHNSON, ALBERT J. HENDERSON, HATCHETT, R. LANIER ANDERSON, III, and CLARK, Circuit Judges.

RONEY, Circuit Judge, with whom Judges TJOFLAT, JAMES C. HILL, FAY, VANCE, ALBERT J. HENDERSON and R. LANIER ANDERSON, III, join *:

This case was taken *en banc* principally to consider the argument arising in numerous capital cases that statistical proof shows the Georgia capital sentencing law is being administered in an unconstitutionally discriminatory and arbitrary and capricious matter. After a lengthy evidentiary hearing which focused on a study by Professor David C. Baldus, the district court concluded for a variety of reasons that the statistical evidence was insufficient to support the claim of unconstitutionality in the death sentencing process in Georgia. We affirm the district court's judgment on this point.

The *en banc* court has considered all the other claims involved on this appeal. On the State's appeal, we reverse the district court's grant of habeas corpus relief on the claim that the prosecutor failed to disclose a promise of favorable treatment to a state witness in violation of *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). We affirm the judgment denying relief on all other points raised by the defendant, that is: (1) that defendant received ineffective assistance of

* All of the Judges of the Court concur in the judgment as to the death-oriented jury claim and the ineffective assistance of counsel claim. Judges Tjoflat, Vance and Anderson join in the opinion but each has written separately on the constitutional application of the Georgia death sentence.
Judge Kravitch has written separately to concur only in the harmless error portion of the opinion on the *Giglio* issue but joins in the opinion on all other issues.
Chief Judge Godbold dissents from the judgment of the Court on the *Giglio* issue but joins in the opinion on all other issues.
Judges Johnson, Hatchett and Clark dissent from the judgment of the Court on the constitutional application of the Georgia death sentence and the *Sandstrom* and *Giglio* issues and each has written a separate dissenting opinion.

counsel; (2) that jury instructions contravened the due process clause in violation of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); and (3) that the exclusion of death-scrupled jurors violated the right to an impartial and unbiased jury drawn from a representative cross-section of the community.

Thus, concluding that the district court should have denied the petition for writ of habeas corpus, we affirm on all claims denied by the court, but reverse the grant of habeas corpus relief on the *Giglio* claims.

FACTS

Warren McCleskey was arrested and charged with the murder of a police officer during an armed robbery of the Dixie Furniture Store. The store was robbed by a band of four men. Three entered through the back door and one through the front. While the men in the rear of the store searched for cash, the man who entered through the front door secured the showroom by forcing everyone there to lie face down on the floor. Responding to a silent alarm, a police officer entered the store by the front door. Two shots were fired. One shot struck the police officer in the head causing his death. The other glanced off a cigarette lighter in his chest pocket.

McCleskey was identified by two of the store personnel as the robber who came in the front door. Shortly after his arrest, McCleskey confessed to participating in the robbery but maintained that he was not the triggerman. McCleskey confirmed the eyewitness' accounts that it was he who entered through the front door. One of his accomplices, Ben Wright, testified that McCleskey admitted to shooting the officer. A jail inmate housed near McCleskey testified that McCleskey made a "jail house confession" in which he claimed he was the triggerman. The police officer was killed by a bullet fired from a .38 caliber Rossi handgun. McCleskey had stolen a .38 caliber Rossi in a previous holdup.

PRIOR PROCEEDINGS

The jury convicted McCleskey of murder and two counts of armed robbery. At the penalty hearing, neither side called any witnesses. The State introduced documentary evidence of McCleskey's three prior convictions for armed robbery.

The jury sentenced McCleskey to death for the murder of the police officer and to consecutive life sentences for the two counts of armed robbery. These convictions and sentences were affirmed by the Georgia Supreme Court. *McCleskey v. State*, 245 Ga. 108, 263 S.E.2d 146, *cert. denied*, 449 U.S. 891, 101 S.Ct. 253, 66 L.Ed.2d 119 (1980). McCleskey then petitioned for habeas corpus relief in state court. This petition was denied after an evidentiary hearing. The Georgia Supreme Court denied McCleskey's application for a certificate of probable cause to appeal. The United States Supreme Court denied a petition for a writ of certiorari. *McCleskey v. Zant*, 454 U.S. 1093, 102 S.Ct. 659, 70 L.Ed.2d 631 (1981).

McCleskey then filed his petition for habeas corpus relief in federal district court asserting, among other things, the five constitutional challenges at issue on this appeal. After an evidentiary hearing and consideration of extensive memoranda filed by the parties, the district court entered the lengthy and detailed judgment from which these appeals are taken. *McCleskey v. Zant*, 580 F.Supp. 338 (N.D.Ga.1984).

This opinion addresses each issue asserted on appeal in the following order: (1) the *Giglio* claim, (2) constitutionality of the application of Georgia's death penalty, (3) effective assistance of counsel, (4) death-qualification of jurors, and (5) the *Sandstrom* issue.

GIGLIO CLAIM

[1] The district court granted habeas corpus relief to McCleskey because it determined that the state prosecutor failed to reveal that one of its witnesses had been promised favorable treatment as a reward for his testimony. The State violates due process when it obtains a conviction through the use of false evidence or on the

basis of a witness's testimony when that witness has failed to disclose a promise of favorable treatment from the prosecution. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

We hold that (1) there was no promise in this case, as contemplated by *Giglio*, and (2) in any event, had there been a *Giglio* violation, it would be harmless. Thus, we reverse the grant of habeas corpus relief on this ground.

Offie Gene Evans, a prisoner incarcerated with McCleskey, was called by the State on rebuttal to strengthen its proof that McCleskey was the triggerman at the hold-up. Evans testified that McCleskey admitted to him in jail that he shot the policeman and that McCleskey said he had worn makeup to disguise his appearance during the robbery.

The "Promise"

At McCleskey's state habeas corpus hearing, Evans gave the following account of certain conversations with state officials.

> THE COURT: Mr. Evans, let me ask you a question. At the time that you testified in Mr. McCleskey's trial, had you been promised anything in exchange for your testimony?
>
> THE WITNESS: No, I wasn't. I wasn't promised nothing about—I wasn't promised nothing by the D.A. but the Detective told me that he would—he said he was going to do it himself, speak a word for me. That was what the Detective told me.
>
> Q: [by McCleskey's attorney:] The Detective said he would speak a word for you?
>
> A: Yeah.

A deposition of McCleskey's prosecutor that was taken for the state habeas corpus proceeding reveals that the prosecutor contacted federal authorities after McCleskey's trial to advise them of Evans' cooperation and that the escape charges were dropped.

The Trial Testimony

At the trial, the State brought out on direct examination that Evans was incarcerated on the charge of escape from a federal halfway house. Evans denied receiving any promises from the prosecutor and downplayed the seriousness of the escape charge.

> Q: [by prosecutor]: Mr. Evans, have I promised you anything for testifying today?
>
> A: No, sir, you ain't.
>
> Q: You do have an escape charge still pending, is that correct?
>
> A: Yes, sir. I've got one, but really it ain't no escape, what the peoples out there tell me, because something went wrong out there so I just went home. I stayed at home and when I called the man and told him that I would be a little late coming in, he placed me on escape charge and told me there wasn't no use of me coming back, and I just stayed on at home and he come and picked me up.
>
> Q: Are you hoping that perhaps you won't be prosecuted for that escape?
>
> A: Yeah, I hope I don't, but I don't—what they tell me, they ain't going to charge me with escape no way.
>
> Q: Have you asked me to try to fix it so you wouldn't get charged with escape?
>
> A: No, sir.
>
> Q: Have I told you I would try to fix it for you?
>
> A: No, sir.

The State Habeas Corpus Decision

The state court rejected McCleskey's *Giglio* claim on the following reasoning:

> Mr. Evans at the habeas hearing denied that he was promised anything for his testimony. He did state that he was told by Detective Dorsey that Dorsey would 'speak a word' for him. The detective's *ex parte* communication recommendation alone is not sufficient to trigger the applicability of *Giglio v. United States*, 405 U.S. 150 [92 S.Ct. 763, 31 L.Ed.2d 104] (1972).

The prosecutor at petitioner's trial, Russel J. Parker, stated that he was unaware of any understandings between Evans and any Atlanta Police Department detectives regarding a favorable recommendation to be made on Evans' federal escape charge. Mr. Parker admitted that there was opportunity for Atlanta detectives to put in a good word for Evans with federal authorities. However, he further stated that when any police officer has been killed and someone ends up testifying for the State, putting his life in danger, it is not surprising that charges, like those against Evans, will be dropped.

In the absence of any other evidence, the Court cannot conclude an agreement existed merely because of the subsequent disposition of criminal charges against a witness for the State.

Although it is reasonable to conclude that the state court found that there was no agreement between Evans and the prosecutor, no specific finding was made as to Evans' claim that a detective promised to "speak a word for him." The court merely held as a matter of law that assuming Evans was telling the truth, no *Giglio* violation had occurred.

Was It a Promise?

The Supreme Court's rationale for imposing this rule is that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959). The Court has never provided definitive guidance on when the Government's dealings with a prospective witness so affect the witness' credibility that they must be disclosed at trial. In *Giglio*, a prosecutor promised the defendant's alleged co-conspirator that no charges would be brought against him if he testified against the defendant. In *Napue*, a prosecutor promised a witness that in exchange for his testimony the prosecutor would recommend that the sentence the witness was presently serving be reduced.

[2, 3] In this case, the detective's promise to speak a word falls far short of the understandings reached in *Giglio* and *Napue*. As stated by this Court, "[t]he thrust of *Giglio* and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony." *Smith v. Kemp*, 715 F.2d 1459, 1467 (11th Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 510, 78 L.Ed.2d 699 (1983). The detective's statement offered such a marginal benefit, as indicated by Evans, that it is doubtful it would motivate a reluctant witness, or that disclosure of the statement would have had any effect on his credibility. The State's nondisclosure therefore failed to infringe McCleskey's due process rights.

Was Any Violation Harmless?

[4] In any event, there is no "reasonable likelihood" that the State's failure to disclose the detective's cryptic statement or Evans' different escape scenario affected the judgment of the jury. *See Giglio*, 405 U.S. at 154, 92 S.Ct. at 766. Evans' credibility was exposed to substantial impeachment even without the detective's statement and the inconsistent description of his escape. The prosecutor began his direct examination by having Evans recite a litany of past convictions. Evans admitted to convictions for forgery, two burglaries, larceny, carrying a concealed weapon, and theft from the United States mail. On cross examination, McCleskey's attorney attempted to portray Evans as a "professional criminal". Evans also admitted that he was testifying to protect himself and one of McCleskey's codefendants. In light of this substantial impeachment evidence, we find it unlikely that the undisclosed information would have affected the jury's assessment of Evans' credibility. *See United States v. Anderson*, 574 F.2d 1347, 1356 (5th Cir.1978).

[5, 6] McCleskey claims Evans' testimony was crucial because the only other testimony which indicated he pulled the trigger came from his codefendant, Ben Wright. Ben Wright's testimony McCleskey urges

would have been insufficient under Georgia law to convict him without the corroboration provided by Evans. In Georgia, an accomplice's testimony alone in felony cases is insufficient to establish a fact. O.C.G.A. § 24-4-8. Wright's testimony, however, was corroborated by McCleskey's own confession in which McCleskey admitted participation in the robbery. *See Arnold v. State*, 236 Ga. 534, 224 S.E.2d 386, 388 (1976). Corroboration need not extend to every material detail. *Blalock v. State*, 250 Ga. 441, 298 S.E.2d 477, 479–80 (1983); *Cofer v. State*, 166 Ga.App. 436, 304 S.E.2d 537, 539 (1983).

The district court thought Evans' testimony critical because of the information he supplied about makeup and McCleskey's intent in shooting the police officer. Although we agree that his testimony added weight to the prosecution's case, we do not find that it could "in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154, 92 S.Ct. at 766 (quoting *Napue v. Illinois*, 360 U.S. at 271, 79 S.Ct. at 1178). Evans, who was called only in rebuttal, testified that McCleskey had told him that he knew he had to shoot his way out, and that even if there had been twelve policemen he would have done the same thing. This statement, the prosecutor argued, showed malice. In his closing argument, however, the prosecutor presented to the jury three reasons supporting a conviction for malice murder. First, he argued that the physical evidence showed malicious intent because it indicated that McCleskey shot the police officer once in the head and a second time in the chest as he lay dying on the floor. Second, the prosecutor asserted that McCleskey had a choice, either to surrender or to kill the officer. That he chose to kill indicated malice. Third, the prosecutor contended that McCleskey's statement to Evans that he still would have shot his way out if there had been twelve police officers showed malice. This statement by McCleskey was not developed at length during Evans' testimony and was mentioned only in passing by the prosecutor in closing argument.

Evans' testimony that McCleskey had made up his face corroborated the identification testimony of one of the eyewitnesses. Nevertheless, this evidence was not crucial to the State's case. That McCleskey was wearing makeup helps to establish he was the robber who entered the furniture store through the front door. This fact had already been directly testified to by McCleskey's accomplice and two eyewitnesses as well as corroborated by McCleskey's own confession. That Evans' testimony buttresses one of the eyewitnesses' identifications is relatively unimportant.

Thus, although Evans' testimony might well be regarded as important in certain respects, the corroboration of that testimony was such that the revelation of the *Giglio* promise would not reasonably affect the jury's assessment of his credibility and therefore would have had no effect on the jury's decision. The district court's grant of habeas corpus relief on this issue must be reversed.

CONSTITUTIONAL APPLICATION OF GEORGIA'S DEATH PENALTY

In challenging the constitutionality of the application of Georgia's capital statute, McCleskey alleged two related grounds for relief: (1) that the "death penalty is administered arbitrarily, capriciously, and whimsically in the State of Georgia," and (2) it "is imposed ... pursuant to a pattern and practice ... to discriminate on the grounds of race," both in violation of the Eighth and Fourteenth Amendments of the Constitution.

The district court granted petitioner's motion for an evidentiary hearing on his claim of system-wide racial discrimination under the Equal Protection Clause of the Fourteenth Amendment. The court noted that "it appears ... that petitioner's Eighth Amendment argument has been rejected by this Circuit in *Spinkellink v. Wainwright*, 578 F.2d 582, 612-14 (5th Cir. 1978) ... [but] petitioner's Fourteenth Amendment claim may be appropriate for consideration in the context of statistical

evidence which the petitioner proposes to present." Order of October 8, 1982, at 4.

An evidentiary hearing was held in August, 1983. Petitioner's case in chief was presented through the testimony of two expert witnesses, Professor David C. Baldus and Dr. George Woodworth, as well as two principal lay witnesses, Edward Gates and L.G. Warr, an official employed by Georgia Board of Pardons and Paroles. The state offered the testimony of two expert witnesses, Dr. Joseph Katz and Dr. Roger Burford. In rebuttal, petitioner recalled Professor Baldus and Dr. Woodworth, and presented further expert testimony from Dr. Richard Berk.

In a comprehensive opinion, reported at 580 F.Supp. 338, the district court concluded that petitioner failed to make out a *prima facie* case of discrimination in sentencing based on either the race of victims or the race of defendants. The Court discounted the disparities shown by the Baldus study on the ground that the research (1) showed substantial flaws in the data base, as shown in tests revealing coding errors and mismatches between items on the Procedural Reform Study (PRS) and Comprehensive Sentencing Study (CSS) questionnaires, (2) lacked accuracy and showed flaws in the models, primarily because the models do not measure decisions based on knowledge available to decisionmaker and only predicts outcomes in 50 percent of the cases; and (3) demonstrated multi-collinearity among model variables, showing interrelationship among the variables and consequently distorting relationships, making interpretation difficult.

The district court further held that even if a *prima facie* case had been established, the state had successfully rebutted the showing because: (1) the results were not the product of good statistical methodology, (2) other explanations for the study results could be demonstrated, such as, white victims were acting as proxies for aggravated cases and that black-victim cases, and (3) black-victim cases, being left cases, and (3) black-victim cases being left behind at the life sentence and voluntary manslaughter stages, are less aggravated and more mitigated than the white-victim cases disposed of in similar fashion.

The district court concluded that petitioner failed to carry his ultimate burden of persuasion, because there is no consistent statistically significant evidence that the death penalty is being imposed on the basis of the race of defendant. In particular there was no statistically significant evidence produced to show that prosecutors are seeking the death penalty or juries are imposing the death penalty because the defendant is black or the victim is white. Petitioner conceded that the study is incapable of demonstrating that he was singled out for the death penalty because of the race of either himself or his victim, and, therefore, petitioner failed to demonstrate that racial considerations caused him to receive the death penalty.

We adopt the following approach in addressing the argument that the district court erred in refusing to hold that the Georgia statute is unconstitutionally applied in light of the statistical evidence. *First*, we briefly describe the statistical Baldus study that was done in this case. *Second*, we discuss the evidentiary value such studies have in establishing the ultimate facts that control a constitutional decision. *Third*, we discuss the constitutional law in terms of what must be proved in order for petitioner to prevail on an argument that a state capital punishment law is unconstitutionally applied because of race discrimination. *Fourth*, we discuss whether a generalized statistical study such as this could ever be sufficient to prove the allegations of ultimate fact necessary to sustain a successful constitutional attack on a defendant's sentence. *Fifth*, we discuss whether this study is valid to prove what it purports to prove. *Sixth*, we decide that this particular study, assuming its validity and that it proves what it claims to prove, is insufficient to either require or support a decision for petitioner.

In summary, we affirm the district court on the ground that, assuming the validity of the research, it would not support a

decision that the Georgia law was being unconstitutionally applied, much less would it compel such a finding, the level which petitioner would have to reach in order to prevail on this appeal.

The Baldus Study

The Baldus study analyzed the imposition of sentence in homicide cases to determine the level of disparities attributable to race in the rate of the imposition of the death sentence. In the first study, Procedural Reform Study (PRS), the results revealed no race-of-defendant effects whatsoever, and the results were unclear at that stage as to race-of-victim effects.

The second study, the Charging and Sentencing Study (CSS), consisted of a random stratified sample of all persons indicted for murder from 1973 through 1979. The study examined the cases from indictment through sentencing. The purpose of the study was to estimate racial effects that were the product of the combined effects of all decisions from the point of indictment to the point of the final death-sentencing decision, and to include strength of the evidence in the cases.

The study attempted to control for all of the factors which play into a capital crime system, such as aggravating circumstances, mitigating circumstances, strength of evidence, time period of imposition of sentence, geographical areas (urban/rural), and race of defendant and victim. The data collection for these studies was exceedingly complex, involving cumbersome data collection instruments, extensive field work by multiple data collectors and sophisticated computer coding, entry and data cleaning processes.

Baldus and Woodworth completed a multitude of statistical tests on the data consisting of regression analysis, indexing factor analysis, cross tabulation, and triangulation. The results showed a 6% racial effect systemwide for white victim, black defendant cases with an increase to 20% in the mid-range of cases. There was no suggestion that a uniform, institutional bias existed that adversely affected defendants in white victim cases in all circumstances, or a black defendant in all cases.

The object of the Baldus study in Fulton County, where McCleskey was convicted, was to determine whether the sentencing pattern disparities that were observed statewide with respect to race of the victim and race of defendant were pertinent to Fulton County, and whether the evidence concerning Fulton County shed any light on Warren McCleskey's death sentence as an aberrant death sentence, or whether racial considerations may have played a role in the disposition of his case.

Because there were only ten cases involving police officer victims in Fulton County, statistical analysis could not be utilized effectively. Baldus conceded that it was difficult to draw any inference concerning the overall race effect in these cases because there had only been one death sentence. He concluded that based on the data there was only a *possibility* that a racial factor existed in McCleskey's case.

Social Science Research Evidence

To some extent a broad issue before this Court concerns the role that social science is to have in judicial decisionmaking. Social science is a broad-based field consisting of many specialized discipline areas, such as psychology, anthropology, economics, political science, history and sociology. *Cf.* Sperlich, *Social Science Evidence and the Courts: Reaching Beyond the Adversary Process*, 63 Judicature 280, 283 n. 14 (1980). Research consisting of parametric and nonparametric measures is conducted under both laboratory controlled situations and uncontrolled conditions, such as real life observational situations, throughout the disciplines. The broad objectives for social science research are to better understand mankind and its institutions in order to more effectively plan, predict, modify and enhance society's and the individual's circumstances. Social science as a *nonexact* science is always mindful that its research is dealing with highly complex behavioral patterns and institutions that exist in a highly technical society. At best, this

research "models" and "reflects" society and provides society with trends and information for broad-based generalizations. The researcher's intent is to use the conclusions from research to predict, plan, describe, explain, understand or modify. To utilize conclusions from such research to explain the specific intent of a specific behavioral situation goes beyond the legitimate uses for such research. Even when this research is at a high level of exactness, in design and results, social scientists readily admit their steadfast hesitancies to conclude such results can explain specific behavioral actions in a certain situation.

The judiciary is aware of the potential limitations inherent in such research: (1) the imprecise nature of the discipline; (2) the potential inaccuracies in presented data; (3) the potential bias of the researcher; (4) the inherent problems with the methodology; (5) the specialized training needed to assess and utilize the data competently; and (6) the debatability of the appropriateness for courts to use empirical evidence in decisionmaking. *Cf.* Henry, *Introduction: A Journey into the Future—The Role of Empirical Evidence in Developing Labor Law*, 1981 U.Ill.L.Rev. 1, 4; Sperlich, 63 Judicature at 283 n. 14.

Historically, beginning with "Louis Brandeis' use of empirical evidence before the Supreme Court ... persuasive social science evidence has been presented to the courts." Forst, Rhodes & Wellford, *Sentencing and Social Science: Research for the Formulation of Federal Guidelines*, 7 Hofstra L.Rev. 355 (1979). *See Muller v. Oregon*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908); *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). The Brandeis brief presented social facts as corroborative in the judicial decisionmaking process. O'Brien, *Of Judicial Myths, Motivations and Justifications: A Postscript on Social Science and the Law*, 64 Judicature 285, 288 (1981). The Brandeis brief "is a well-known technique for asking the court to take judicial notice of social facts." Sperlich, 63 Judicature at 280, 285 n. 31. "It does not solve the problem of how to bring valid scientific materials to the attention of the court. ... Brandeis did not argue that the data were valid, only that they existed ... The main contribution ... was to make extra-legal data readily available to the court." *Id.*

This Court has taken a position that social science research does play a role in judicial decisionmaking in certain situations, even in light of the limitations of such research. Statistics have been used primarily in cases addressing discrimination.

[7] Statistical analysis is useful only to show facts. In evidentiary terms, statistical studies based on correlation are circumstantial evidence. They are not direct evidence. *Teamsters v. United States*, 431 U.S. 324, 340, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977). Statistical studies do not purport to state what the law is in a given situation. The law is applied to the facts as revealed by the research.

In this case the realities examined, based on a certain set of facts reduced to data, were the descriptive characteristics and numbers of persons being sentenced to death in Georgia. Such studies reveal, as circumstantial evidence through their study analyses and results, possible, or probable, relationships that may exist in the realities studied.

[8] The usefulness of statistics obviously depends upon what is attempted to be proved by them. If disparate impact is sought to be proved, statistics are more useful than if the causes of that impact must be proved. Where intent and motivation must be proved, the statistics have even less utility. This Court has said in discrimination cases, however, "that while statistics alone usually cannot establish intentional discrimination, under certain limited circumstances they might." *Spencer v. Zant*, 715 F.2d 1562, 1581 (11th Cir. 1983), *on pet. for reh'g and for reh'g en banc*, 729 F.2d 1293 (11th Cir.1984). *See also England v. Tennessee Valley Authority*, 704 F.2d 613, 619 (11th Cir.1983); *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419, 421 (5th Cir.1980), *cert. denied*, 459 U.S.

967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). These limited circumstances are where the statistical evidence of racially disproportionate impact is so strong as to permit no inference other than that the results are the product of a racially discriminatory intent or purpose. *See Smith v. Balkcom*, 671 F.2d 858 (5th Cir. Unit B), *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982).

[9] Statistical evidence has been received in two ways. The United States Supreme Court has simply recognized the existence of statistical studies and social science research in making certain decisions, without such studies being subject to the rigors of an evidentiary hearing. *Muller v. Oregon*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908); *Fowler v. North Carolina*, 428 U.S. 904, 96 S.Ct. 3212, 49 L.Ed.2d 1212 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The "Supreme Court, for example, encountered severe criticism and opposition to its rulings on desegregation of public schools, the exclusionary rule, and the retroactivity of its decisions, precisely because the court relied on empirical generalization." O'Brien, *The Seduction of the Judiciary: Social Science and the Courts*, 64 Judicature 8, 19 (1980). In each of these situations the Court "focused" beyond the specifics of the case before it to the "institutions" represented and through a specific ruling effected changes in the institutions. On the other hand, statistical evidence may be presented in the trial court through direct testimony and cross-examination on statistical information that bears on an issue. Such evidence is examined carefully and subjected to the tests of relevancy, authenticity, probativeness and credibility. *Cf.* Henry, 1981 U.Ill.L.Rev. at 9.

One difficulty with statistical evidence is that it may raise more questions than it answers. This Court reached that conclusion in *Wilkins v. University of Houston*, 654 F.2d 388 (5th Cir. Unit A 1981). In *Wilkins* this Court held that "[m]ultiple regression analysis is a relatively sophisticated means of determining the effects that any number of different factors have on a particular variable." *Id.* at 402–03. This Court noted that the methodology "is subject to misuse and thus must be employed with great care." *Id.* at 403. Procedurally, when multiple regression is used "it will be the subject of expert testimony and knowledgeable cross-examination from both sides. In this manner, the validity of the model and the significance of its results will be fully developed at trial, allowing the trial judge to make an informed decision as to the probative value of the analysis." *Id.* Having done this, the *Wilkins* Court, in an employment discrimination case, held "the statistical evidence associated with the multiple regression analysis is inconclusive, raising more questions than it answers." *Id.*

Even if the statistical evidence is strong there is generally a need for additional evidence. In *Wade v. Mississippi Cooperative Extension Serv.*, 528 F.2d 508 (5th Cir.1976), the results drawn from the multivariate regression analysis were supported by additional evidence. *Id.* at 517. In *Wade* the statistics did not "stand alone" as the sole proof of discrimination.

Much has been written about the relationship of law and social science. "If social science cannot produce the required answers, and it probably cannot, its use is likely to continue to lead to a disjointed incrementalism." Daniels, *Social Science And Death Penalty Cases*, 1 Law & Pol'y Q. 336, 367 (1979). "Social science can probably make its greatest contribution to legal theory by investigating the causal forces behind judicial, legislative and administrative decisionmaking and by probing the general effects of such decisions." Nagel, *Law And The Social Sciences: What Can Social Science Contribute?*, 35d A.B.A.J. 356, 357–58 (1965).

With these observations, this Court accepts social science research for what the

social scientist should claim for it. As in all circumstantial evidence cases, the inferences to be drawn from the statistics are for the factfinder, but the statistics are accepted to show the circumstances.

Racial Discrimination, the Death Penalty, and the Constitution

McCleskey contends his death sentence is unconstitutional because Georgia's death penalty is discriminatorily applied on the basis of the race of the defendant and the victim. Several different constitutional bases for this claim have been asserted. McCleskey relies on the arbitrary, capricious and irrational components of the prohibition of cruel and unusual punishment in the Eighth Amendment and the equal protection clause of the Fourteenth Amendment. The district court thought that with respect to race-of-the-victim discrimination the petitioner more properly stated a claim under the due process clause of the Fourteenth Amendment.

Claims of this kind are seldom asserted with a degree of particularity, and they generally assert several constitutional precepts. On analysis, however, there seems to be little difference in the proof that might be required to prevail under any of the three theories.

In *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Supreme Court struck down the Georgia death penalty system on Eighth Amendment grounds, with several of the concurring justices holding that the system operated in an arbitrary and capricious manner because there was no rational way to distinguish the few cases in which death was imposed from the many in which it was not. *Id.* at 313, 92 S.Ct. at 2764 (White, J., concurring); *id.* at 309–10, 92 S.Ct. at 2762–63 (Stewart, J. concurring). Although race discrimination in the imposition of the death penalty was not the basis of the decision, it was one of several concerns addressed in both the concurring and dissenting opinions. *See id.* at 249–52, 92 S.Ct. at 2731–33 (Douglas, J. concurring); *id.* at 309–10, 92 S.Ct. at 2762–63 (Stewart, J. concurring); *id.* at 364–67, 92 S.Ct. at 2790–91 (Marshall, J., concurring); *id.* at 389–90 n. 12, 92 S.Ct. at 2803–04 n. 12 (Burger, C.J., dissenting); *id.* at 449, 92 S.Ct. at 2833 (Powell, J., dissenting).

Four years later, the Supreme Court approved the redrawn Georgia statute pursuant to which McCleskey was tried and sentenced. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). At the same time the Court approved statutes from Florida and Texas which, like Georgia, followed a guided discretion approach, but invalidated the mandatory sentencing procedure of North Carolina and Louisiana. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

Since *Gregg*, we have consistently held that to state a claim of racial discrimination in the application of a constitutional capital statute, intent and motive must be alleged. *Sullivan v. Wainwright*, 721 F.2d 316, 317 (11th Cir.1983) (statistical impact studies insufficient to show state system "intentionally discriminated against petitioner"), *petition for stay of execution denied*, — U.S. —, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983); *Adams v. Wainwright*, 709 F.2d 1443, 1449 (11th Cir.1983) (requiring "a showing of an intent to discriminate" or "evidence of disparate impact . . . so strong that the only permissible inference is one of intentional discrimination"), *cert. denied*, — U.S. —, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984); *Smith v. Balkcom*, 671 F.2d 858, 859 (5th Cir.Unit B) (requiring "circumstantial or statistical evidence of racially disproportionate impact . . . so strong that the results permit no other inference but that they are the product of a racially discriminatory intent or purpose"), *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982).

Initially in *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1544, 59 L.Ed.2d 794 (1979), the Court rejected Eighth and Four

teenth Amendment claims that the Florida death penalty was being applied in a discriminatory fashion on the basis of the victim's race. The *Spinkellink* Court read *Gregg* and its companion cases "as holding that if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness—and therefore the racial discrimination condemned in *Furman*—have been conclusively removed." *Id.* at 613–14. *Spinkellink* can not be read to foreclose automatically all Eighth Amendment challenges to capital sentencing conducted under a facially constitutional statute. In *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the Supreme Court sustained an Eighth Amendment challenge to a Georgia death sentence because the Georgia court's construction of a portion of that facially valid statute left no principled way to distinguish the cases where the death penalty was imposed from those in which it was not. *See Proffitt v. Wainwright*, 685 F.2d 1227, 1261 n. 52 (11th Cir.1982). Nevertheless, neither *Godfrey* nor *Proffitt* undermines this Court's prior and subsequent pronouncements in *Spinkellink*, *Smith*, *Adams*, and *Sullivan* regarding the amount of disparate impact that must be shown under either an Eighth Amendment or equal protection analysis.

As the district court here pointed out, such a standard indicates an analytical nexus between Eighth Amendment claims and a Fourteenth Amendment equal protection claim. *McCleskey v. Zant*, 580 F.Supp. 338, 347 (N.D.Ga.1984). Where an Eighth Amendment claim centers around generalized showings of disparate racial impact in capital sentencing, such a connection is inescapable. Although conceivably the level or amount of disparate racial impact that would render a state's capital sentencing system arbitrary and capricious under the Eighth Amendment might differ slightly from the level or amount of disparate racial impact that would compel an inference of discriminatory intent under the equal protection clause of the Fourteenth Amendment, we do not need to decide whether there could be a difference in magnitude that would lead to opposite conclusions on a system's constitutionality depending on which theory a claimant asserts.

[10] A successful Eighth Amendment challenge would require proof that the race factor was operating in the system in such a pervasive manner that it could fairly be said that the system was irrational, arbitrary and capricious. For the same reasons that the Baldus study would be insufficient to demonstrate discriminatory intent or unconstitutional discrimination in the Fourteenth Amendment context, it would be insufficient to show irrationality, arbitrariness and capriciousness under any kind of Eighth Amendment analysis.

The district court stated that were it writing on a clean slate, it would characterize McCleskey's claim as a due process claim. The court took the position that McCleskey's argument, while couched in terms of "arbitrary and capricious," fundamentally contended that the Georgia death penalty was applied on the basis of a morally impermissible criterion: the race of the victim.

[11] The district court's theory derives some support from the Supreme Court's decision in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). The Court there recognized that a state may not attach the "aggravating" label as an element in capital sentencing to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as race. If that were done, the Court said, "due process would require that the jury's decision to impose death be set aside." *Id.* 462 U.S. at ——, 103 S.Ct. at 2747, 77 L.Ed.2d at 253. From this language it is clear that due process would prevent a state from explicitly making the murder of a white victim an aggravating circumstance in capital sentencing. But where the statute is facially neutral, a due process claim must be supported by proof that a state, through its prosecutors, jurors, and judges, has implicitly attached the aggravating label to race.

[12, 13] Even if petitioner had characterized his claim as one under the due process clause, it would not have altered the legal standard governing the showing he must make to prevail. The application of the due process clause is "an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." *Lassiter v. Department of Social Services*, 452 U.S. 18, 24–25, 101 S.Ct. 2153, 2158–2159, 68 L.Ed.2d 640 (1981). Due process also requires the assessment of the risk that the procedures being used will lead to erroneous decisions. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). Where a due process claim requires a court to determine whether the race of the victim impermissibly affected the capital sentencing process, decisions under the equal protection clause, characterized as "central to the Fourteenth Amendment's prohibition of discriminatory action by the State," *Rose v. Mitchell*, 443 U.S. 545, 554–55, 99 S.Ct. 2993, 2999–3000, 61 L.Ed.2d 739 (1979), are certainly "relevant precedents" in the assessment of the risk of erroneous decisions. Thus, as in the equal protection context, the claimant under a due process theory must present evidence which establishes that in the capital sentencing process race "is a motivating factor in the decision." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977).

[14] Due process and cruel and unusual punishment cases do not normally focus on the intent of the governmental actor. But where racial discrimination is claimed, not on the basis of procedural faults or flaws in the structure of the law, but on the basis of the decisions made within that process, then purpose, intent and motive are a natural component of the proof that discrimination actually occurred.

[15] The Supreme Court has clearly held that to prove a constitutional claim of racial discrimination in the equal protection context, intent, purpose, and motive are necessary components. *Washington v. Davis*, 426 U.S. 229, 238–42, 96 S.Ct. 2040, 2046–49, 48 L.Ed.2d 597 (1976). A showing of a disproportionate impact alone is not sufficient to prove discriminatory intent unless no other reasonable inference can be drawn. *Arlington Heights*, 429 U.S. at 264–66, 97 S.Ct. at 562–64. This Circuit has consistently applied these principles of law. *Adams v. Wainwright*, 709 F.2d 1443, 1449 (11th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984); *Sullivan v. Wainwright*, 721 F.2d 316, 317 (11th Cir.1983).

[16] We, therefore, hold that proof of a disparate impact alone is insufficient to invalidate a capital sentencing system, unless that disparate impact is so great that it compels a conclusion that the system is unprincipled, irrational, arbitrary and capricious such that purposeful discrimination—*i.e.*, race is intentionally being used as a factor in sentencing—can be presumed to permeate the system.

Generalized Statistical Studies and the Constitutional Standard

[17] The question initially arises as to whether any statewide study suggesting a racial disparity in the application of a state's death penalty could ever support a constitutional attack on a defendant's sentence. The answer lies in whether the statistical study is sufficient evidence of the ultimate fact which must be shown.

In *Smith v. Balkcom*, 671 F.2d 858, 859 (5th Cir.Unit B), *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 144 (1982), this Court said:

> In some instances circumstantial or statistical evidence of racially disproportionate impact may be so strong that the results permit no other inference but that they are the product of a racially discriminatory intent or purpose.

This statement has apparently caused some confusion because it is often cited as a proposition for which it does not stand. Petitioner argues that his statistical study

shows a strong inference that there is a disparity based on race. That is only the first step, however. The second step focuses on how great the disparity is. Once the disparity is proven, the question is whether that disparity is sufficient to compel a conclusion that it results from discriminatory intent and purpose. The key to the problem lies in the principle that the proof, no matter how strong, of some disparity is alone insufficient.

In *Spinkellink v. Wainwright*, 578 F.2d 582, 612 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), the petitioner claimed the Florida statute was being applied in a discriminatory fashion against defendants murdering whites, as opposed to blacks, in violation of the cruel and unusual punishment and equal protection components of the Constitution. Evidence of this disparity was introduced through expert witnesses. The court assumed for sake of argument the accuracy of petitioner's statistics but rejected the Eighth Amendment argument. The court rejected the equal protection argument because the disparity shown by petitioner's statistics could not prove racially discriminatory intent or purpose as required by *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). 578 F.2d at 614–16.

In *Adams v. Wainwright*, 709 F.2d 1443 (11th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984), the court, in denying an evidentiary hearing, accepted statistics which arguably tended to support the claim that the Florida death penalty was imposed disproportionately in cases involving white victims. The court then said:

> Disparate impact alone is insufficient to establish a violation of the fourteenth amendment. There must be a showing of an intent to discriminate . . . Only if the evidence of disparate impact is so strong that the only permissible inference is one of intentional discrimination will it alone suffice.

709 F.2d at 1449 (citations omitted). Here again, in commenting on the strength of the evidence, the court was referring not to the amount or quality of evidence which showed a disparate impact, but the amount of disparate impact that would be so strong as to lead inevitably to a finding of motivation and intent, absent some other explanation for the disparity.

In commenting on the proffer of the Baldus study in another case, Justice Powell wrote in dissent from a stay of execution pending *en banc* consideration of this case:

> If the Baldus study is similar to the several studies filed with us in *Sullivan v. Wainwright*, — U.S. —, 104 S.Ct. 90, 78 L.Ed.2d 266 (1983), the statistics in studies of this kind, many of which date as far back as 1948, are merely general statistical surveys that are hardly *particularized* with respect to any alleged "intentional" racial discrimination. Surely, no contention can be made that the entire Georgia judicial system, at all levels, operates to discriminate in all cases. Arguments to this effect may have been directed to the type of statutes addressed in *Furman v. Georgia*, 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346] (1972). As our subsequent cases make clear, such arguments cannot be taken seriously under statutes approved in *Gregg*

Stephens v. Kemp, — U.S. —, — n. 2, 104 S.Ct. 562, 564 n. 2, 78 L.Ed.2d 370, 374 n. 2 (1984) (Powell, J., dissenting).

The lesson from these and other cases must be that generalized statistical studies are of little use in deciding whether a particular defendant has been unconstitutionally sentenced to death. As to whether the system can survive constitutional attack, statistical studies at most are probative of how much disparity is present, but it is a legal question as to how much disparity is required before a federal court will accept it as evidence of the constitutional flaws in the system.

This point becomes especially critical to a court faced with a request for an evidentiary hearing to produce future studies which

will undoubtedly be made. Needless to say, an evidentiary hearing would be necessary to hear any evidence that a particular defendant was discriminated against because of his race. But general statistical studies of the kind offered here do not even purport to prove that fact. Aside from that kind of evidence, however, it would not seem necessary to conduct a full evidentiary hearing as to studies which do nothing more than show an unexplainable disparity. Generalized studies would appear to have little hope of excluding every possible factor that might make a difference between crimes and defendants, exclusive of race. To the extent there is a subjective or judgmental component to the discretion with which a sentence is invested, not only will no two defendants be seen identical by the sentencers, but no two sentencers will see a single case precisely the same. As the court has recognized, there are "countless racially neutral variables" in the sentencing of capital cases. *Smith v. Balkcom*, 671 F.2d at 859.

This is not to recede from the general proposition that statistical studies may reflect a disparity so great as to inevitably lead to a conclusion that the disparity results from intent or motivation. As decided by this opinion, the Baldus studies demonstrate that the Georgia system does not contain the level of disparity required to meet that constitutional standard.

Validity of the Baldus Study

The social science research of Professor Baldus purports to reveal, through statistical analysis, disparities in the sentencing of black defendants in white victim cases in Georgia. A study is valid if it measures what it purports to measure. Different studies have different levels of validity. The level of the validity of the study is directly related to the degree to which the social scientist can rely on the findings of the study as measuring what it claims to measure.

The district court held the study to be invalid because of perceived errors in the data base, the deficiencies in the models and the multi-collinearity existing between the independent variables. We hold in this case that even if the statistical results are accepted as valid, the evidence fails to challenge successfully the constitutionality of the Georgia system. Because of this decision, it is not necessary for us to determine whether the district court was right or wrong in its faulting of the Baldus study.

The district court undertook an extensive review of the research presented. It received, analyzed and dealt with the complex statistics. The district court is to be commended for its outstanding endeavor in the handling of the detailed aspects of this case, particularly in light of the consistent arguments being made in several cases based on the Baldus study. Any decision that the results of the Baldus study justify habeas corpus relief would have to deal with the district court's findings as to the study itself. Inasmuch as social science research has been used by appellate courts in decisionmaking, *Muller v. Oregon*, 208 U.S. 412, 419–21, 28 S.Ct. 324, 325–26, 52 L.Ed. 551 (1908), and has been tested like other kinds of evidence at trial, *see Spinkellink v. Wainwright*, 578 F.2d 582, 612–13 (5th Cir.1978), there is a question as to the standard of review of a trial court's finding based on a highly complex statistical study.

[18] Findings of fact are reviewed under the clearly erroneous standard which the Supreme Court has defined as: "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

[19] Whether a disparate impact reflects an intent to discriminate is an ultimate fact which must be reviewed under the clearly erroneous standard. *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). In *Pullman*, the Supreme Court said that Fed.R.Civ.P. 52(a)

does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts.

456 U.S. at 287, 102 S.Ct. at 1789.

There would seem to be two levels of findings based on statistical evidence that must be reviewed: *first*, the finding concerning the validity of the study itself, and *second*, the finding of ultimate fact based upon the circumstantial evidence revealed by the study, if valid.

The district court here found the study invalid. The court found the statistics of the study to be particularly troublesome in the areas of the data base, the models and the relationship between the independent variables. *McCleskey v. Zant*, 580 F.Supp. 338, 379 (N.D.Ga.1984). We pretermit a review of this finding concerning the validity of the study itself. The district court went on to hold that even if the statistics did validly reflect the Georgia system, the ultimate fact of intent to discriminate was not proven. We review this finding of fact by assuming the validity of the study and rest our holding on the decision that the study, even if valid, not only supports the district judge's decision under the clearly erroneous standard of review, but compels it.

Sufficiency of Baldus Study

McCleskey argues that, although the post-*Furman* statute in Georgia now yields more predictable results, the race of the victim is a significant, but of course impermissible, factor which accounts for the imposition of the death penalty in many cases. He supports this argument with the sophisticated Baldus statistical study that, after controlling for the legitimate factors that might rationally explain the imposition of the penalty, purportedly reveals significant race-of-the-victim influence in the system, i.e., all other things being equal, white victim crimes are more likely to result in the penalty. Because the Constitution prohibits the consideration of racial factors as justification for the penalty, McCleskey asserts that the discernible racial influence on sentencing renders the operation of the Georgia system infirm.

In addition, McCleskey asserts that the race-of-the-victim influence on the system is particularly significant in the range of cases involving intermediate levels of aggravation (mid-range aggravation cases). He argues that because his case fell within that range, he has established that impermissible racial considerations operated in his case.

We assume without deciding that the Baldus study is sufficient to show what it purports to reveal as to the application of the Georgia death penalty. Baldus concluded that his study showed that systematic and substantial disparities existed in the penalties imposed upon homicide defendants in Georgia based on race of the homicide victim, that the disparities existed at a less substantial rate in death sentencing based on race of defendants, and that the factors of race of the victim and defendant were at work in Fulton County.

A general comment about the limitations on what the Baldus study purports to show, although covered in the subsequent discussion, may be helpful. The Baldus study statistical evidence does not purport to show that McCleskey was sentenced to death because of either his race or the race of his victim. It only shows that in a group involving blacks and whites, all of whose cases are virtually the same, there would be more blacks receiving the death penalty than whites and more murderers of whites receiving the death penalty than murderers of blacks. The statisticians' "best guess" is that race was a factor in those cases and has a role in sentencing structure in Georgia. These general statements about the results are insufficient to make a legal determination. An analysis must be made as to how much disparity is actually shown by the research.

Accepting the Baldus figures, but not the general conclusion, as accurately reflecting

the Georgia experience, the statistics are inadequate to entitle McCleskey to relief on his constitutional claim.

The Georgia-based retrospective study consisted of a stratified random sample of 1,066 cases of individuals indicted for murder-death, murder-life and voluntary manslaughter who were arrested between March 28, 1973 and December 31, 1978. The data were compiled from a 41-page questionnaire and consisted of more than 500,000 entries. Through complex statistical analysis, Baldus examined relationships between the dependent variable, death-sentencing rate, and independent variables, nine aggravating and 75 mitigating factors, while controlling for background factors. In 10% of the cases a penalty trial was held, and in 5% of the cases defendants were sentenced to death.

The study subjects the Georgia data to a multitude of statistical analyses, and under each method there is a statistically significant race-of-the-victim effect operating statewide. It is more difficult, however, to ascertain the magnitude of the effect demonstrated by the Baldus study. The simple, unadjusted figures show that death sentences were imposed in 11% of the white victim cases potentially eligible for the death penalty, and in 1% of the eligible black victim cases. After controlling for various legitimate factors that could explain the differential, Baldus still concluded that there was a significant race-of-the-victim effect. The result of Baldus' most conclusive model, on which McCleskey primarily relies, showed an effect of .06, signifying that on average a white victim crime is 6% more likely to result in the sentence than a comparable black victim crime. Baldus also provided tables that showed the race-of-the-victim effect to be most significant in cases involving intermediate levels of aggravation. In these cases, on average, white victim crimes were shown to be 20% more likely to result in the death penalty than equally aggravated black victim crimes.

None of the figures mentioned above is a definitive quantification of the influence of the victim's race or the overall likelihood of the death penalty in a given case. Nevertheless, the figures all serve to enlighten us somewhat on how the system operates. The 6% average figure is a composite of all cases and contains both low aggravation cases, where the penalty is almost never imposed regardless of the victim's race, and high aggravation cases, where both white and black victim crimes are likely to result in the penalty. When this figure is related to tables that classify cases according to the level of aggravation, the 6% average figure is properly seen as an aggregate containing both cases in which race of the victim is a discernible factor and those in which it is not.

McCleskey's evidence, and the evidence presented by the state, also showed that the race-of-the-victim factor diminishes as more variables are added to the model. For example, the bottom line figure was 17% in the very simple models, dropped to 6% in the 230-variable model, and finally fell to 4% when the final 20 variables were added and the effect of Georgia Supreme Court review was considered.

The statistics are also enlightening on the overall operation of the legitimate factors supporting the death sentence. The Baldus study revealed an essentially rational system, in which high aggravation cases were more likely to result in the death sentence than low aggravation cases. As one would expect in a rational system, factors such as torture and multiple victims greatly increased the likelihood of receiving the penalty.

There are important dimensions that the statistics cannot reveal. Baldus testified that the Georgia death penalty system is an extremely complicated process in which no single factor or group of factors determines the outcome of a given case. No single petitioner could, on the basis of these statistics alone, establish that he received the death sentence because, and only because, his victim was white. Even in the mid-range of cases, where the race-of-the-victim influence is said to be strong, legitimate factors justifying the penalty

are, by the very definition of the mid-range, present in each case.

The statistics show there is a race-of-the-victim relationship with the imposition of the death sentence discernible in enough cases to be statistically significant in the system as a whole. The magnitude cannot be called determinative in any given case.

The evidence in the Baldus study seems to support the Georgia death penalty system as one operating in a rational manner. Although no single factor, or combination of factors, will irrefutably lead to the death sentence in every case, the system in operation follows the pattern the legislature intended, which the Supreme Court found constitutional in *Gregg*, and sorts out cases according to levels of aggravation, as gauged by legitimate factors. The fundamental Eighth Amendment concern of *Furman*, as discussed in *Gregg*, which states that "there is no meaningful basis for distinguishing the few cases in which [the death sentence] is imposed from the many in which it is not" does not accurately describe the operation of the Georgia statute. 428 U.S. at 188, 96 S.Ct. at 2932.

[20] Taking the 6% bottom line revealed in the Baldus figures as true, this figure is not sufficient to overcome the presumption that the statute is operating in a constitutional manner. In any discretionary system, some imprecision must be tolerated, and the Baldus study is simply insufficient to support a ruling, in the context of a statute that is operating much as intended, that racial factors are playing a role in the outcome sufficient to render the system as a whole arbitrary and capricious.

This conclusion is supported, and possibly even compelled, by recent Supreme Court opinions in *Sullivan* v. *Wainwright*, — U.S. —, 104 S.Ct. 450, 78 L.Ed.2d 210 (1982) (denying stay of execution to allow evidentiary hearing on Eighth Amendment claim supported by statistics); *Wainwright* v. *Adams*, — U.S. —, 104 S.Ct. 2150, 80 L.Ed.2d 809 (1984) (vacating stay); and *Wainwright* v. *Ford*, — U.S. —, 104 S.Ct. 3448, 82 L.Ed.2d 911 (1984) (denying state's application to vacate stay on other grounds). A plurality of the Court in *Ford* definitively stated that it had held "in two prior cases that the statistical evidence relied upon by Ford to support his claim of discrimination was not sufficient to raise a substantial ground upon which relief might be granted." *Id.* at —, 104 S.Ct. at 3499, 82 L.Ed.2d at 912 (citing *Sullivan* and *Adams*). The petitioners in *Sullivan*, *Adams*, and *Ford* all relied on the study by Gross and Mauro of the Florida death penalty system. The bottom line figure in the Gross and Mauro study indicated a race-of-the-victim effect, quantified by a "death odds multiplier," of about 4.8 to 1. Using a similar methodology, Baldus obtained a death odds multiplier of 4.3 to 1 in Georgia.

It is of course possible that the Supreme Court was rejecting the methodology of the Florida study, rather than its bottom line. It is true that the methodology of the Baldus study is superior. The posture of the Florida cases, however, persuades this Court that the Supreme Court was not relying on inadequacies in the methodology of the Florida study. The issue in *Sullivan*, *Adams*, and *Ford* was whether the petitioner's proffer had raised a substantial ground sufficient to warrant an evidentiary hearing. In that context, it is reasonable to suppose that the Supreme Court looked at the bottom line indication of racial effect and held that it simply was insufficient to state a claim. A contrary assumption, that the Supreme Court analyzed the extremely complicated Gross and Mauro study and rejected it on methodological grounds, is much less reasonable.

Thus, assuming that the Supreme Court in *Sullivan*, *Adams* and *Ford* found the bottom line in the Gross and Mauro study insufficient to raise a constitutional claim, we would be compelled to reach the same result in analyzing the sufficiency of the comparable bottom line in the Baldus study on which McCleskey relies.

McCleskey's argument about the heightened influence of the race-of-the-victim factor in the mid-range of cases requires a somewhat different analysis. McCleskey's case falls within the range of cases involv-

ing intermediate levels of aggravation. The Baldus statistical study tended to show that the race-of-the-victim relationship to sentencing outcome was greater in these cases than in cases involving very low or very high levels of aggravation.

The race-of-the-victim effect increases the likelihood of the death penalty by approximately 20% in the mid-range of cases. Some analysis of this 20% figure is appropriate.

The 20% figure in this case is not analogous to a figure reflecting the percentage disparity in a jury composition case. Such a figure represents the *actual* disparity between the number of minority persons on the jury venire and the number of such persons in the population. In contrast, the 20% disparity in this case does not purport to be an actual disparity. Rather, the figure reflects that the variables included in the study do not adequately explain the 20% disparity and that the statisticians can explain it only by assuming the racial effect. More importantly, Baldus did not testify that he found statistical significance in the 20% disparity figure for mid-range cases, and he did not adequately explain the rationale of his definition of the mid-range of cases. His testimony leaves this Court unpersuaded that there is a rationally classified, well-defined class of cases in which it can be demonstrated that a race-of-the-victim effect is operating with a magnitude approximating 20%.

[21] Assuming *arguendo*, however, that the 20% disparity is an accurate figure, it is apparent that such a disparity only in the mid-range cases and not in the system as a whole, cannot provide the basis for a systemwide challenge. As previously discussed, the system as a whole is operating in a rational manner, and not in a manner that can fairly be labeled arbitrary or capricious. A valid system challenge cannot be made only against the mid-range of cases. Baldus did not purport to define the mid-range of cases, nor is such a definition possible. It is simply not satisfactory to say that the racial effect operates in "close cases" and therefore that the death penalty will be set aside in "close cases."

[22] As discussed previously, the statistics cannot show that the race-of-the-victim factor operated in a given case, even in the mid-range. Rather, the statistics show that, on average, the race-of-the-victim factor was more likely to affect the outcome in mid-range cases than in those cases at the high and low ends of the spectrum of aggravation. The statistics alone are insufficient to show that McCleskey's sentence was determined by the race of his victim, or even that the race of his victim contributed to the imposition of the penalty in his case.

McCleskey's petition does not surmount the threshold burden of stating a claim on this issue. Aside from the statistics, he presents literally no evidence that might tend to support a conclusion that the race of McCleskey's victim in any way motivated the jury to impose the death sentence in his case.

Conclusion

The Supreme Court has held that to be constitutional the sentencer in death sentence cases must have some measure of discretion. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). The mandatory death sentence statutes were declared unconstitutional. *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

The very exercise of discretion means that persons exercising discretion may reach different results from exact duplicates. Assuming each result is within the range of discretion, all are correct in the eyes of the law. It would not make sense for the system to require the exercise of discretion in order to be facially constitutional, and at the same time hold a system unconstitutional in application where that discretion achieved different results for what appear to be exact duplicates, absent the state showing the reasons for the difference. The discretion is narrow, focused

and directed, but still there is a measure of discretion.

The Baldus approach, however, would take the cases with different results on what are contended to be duplicate facts, where the differences could not be otherwise explained, and conclude that the different result was based on race alone. From a legal perspective, petitioner would argue that since the difference is not explained by facts which the social scientist thinks satisfactory to explain the differences, there is a *prima facie* case that the difference was based on unconstitutional factors, and the burden would shift to the state to prove the difference in results from constitutional considerations. This approach ignores the realities. It not only ignores quantitative differences in cases: looks, age, personality, education, profession, job, clothes, demeanor, and remorse, just to name a few, but it is incapable of measuring qualitative differences of such things as aggravating and mitigating factors. There are, in fact, no exact duplicates in capital crimes and capital defendants. The type of research submitted here tends to show which of the directed factors were effective, but is of restricted use in showing what undirected factors control the exercise of constitutionally required discretion.

It was recognized when *Gregg* was decided that the capital justice system would not be perfect, but that it need not be perfect in order to be constitutional. Justice White said:

> Petitioner has argued, in effect, that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law. Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder.

Gregg v. Georgia, 428 U.S. 153, 226, 96 S.Ct. 2909, 2949, 49 L.Ed.2d 859 (1976) (White, J., concurring).

The plurality opinion of the *Gregg* Court noted:

> The petitioner's argument is nothing more than a veiled contention that *Furman* indirectly outlawed capital punishment by placing totally unrealistic conditions on its use. In order to repair the alleged defects pointed to by the petitioner, it would be necessary to require that prosecuting authorities charge a capital offense whenever arguably there had been a capital murder and that they refuse to plea bargain with the defendant. If a jury refused to convict even though the evidence supported the charge, its verdict would have to be reversed and a verdict of guilty entered or a new trial ordered, since the discretionary act of jury nullification would not be permitted. Finally, acts of executive clemency would have to be prohibited. Such a system, of course, would be totally alien to our notions of criminal justice.

Id. at 199 n. 50, 96 S.Ct. at 2937 n. 50 (opinion of Stewart, Powell, and Stevens, JJ.).

Viewed broadly, it would seem that the statistical evidence presented here, assuming its validity, confirms rather than condemns the system. In a state where past discrimination is well documented, the study showed no discrimination as to the race of the defendant. The marginal disparity based on the race of the victim tends to support the state's contention that the system is working far differently from the one which *Furman* condemned. In pre-*Furman* days, there was no rhyme or reason as to who got the death penalty and who did not. But now, in the vast majority of cases, the reasons for a difference are well documented. That they are not so clear in a small percentage of the cases is no reason to declare the entire system unconstitutional.

The district court properly rejected this aspect of McCleskey's claim.

INEFFECTIVE ASSISTANCE OF COUNSEL

McCleskey contends his trial counsel rendered ineffective assistance at both guilt/innocence and penalty phases of his trial in violation of the Sixth Amendment.

[23, 24] Although a defendant is constitutionally entitled to reasonably effective assistance from his attorney, we hold that McCleskey has not shown he was prejudiced by the claimed defaults in his counsel's performance. Ineffective assistance warrants reversal of a conviction only when there is a reasonable probability that the attorney's errors altered the outcome of the proceeding. A court may decide an ineffectiveness claim on the ground of lack of prejudice without considering the reasonableness of the attorney's performance. *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

As to the guilt phase of his trial, McCleskey claims that his attorney failed to: (1) interview the prisoner who testified that McCleskey gave a jail house confession; (2) interview and subpoena as defense witnesses the victims of the Dixie Furniture Store robbery; and (3) interview the State's ballistics expert.

[25] McCleskey demonstrates no prejudice caused by his counsel's failure to interview Offie Evans. We have held there was no reasonable likelihood that the disclosure of the detective's statement to Offie Evans would have affected the verdict. There is then no "reasonable probability" that the attorney's failure to discover this evidence affected the verdict.

[26] As to the robbery victims, McCleskey does not contend that an in-person interview would have revealed something their statements did not. He had an opportunity to cross-examine several of the robbery victims and investigating officers at McCleskey's preliminary hearing. The reasonableness of the attorney's investigation need not be examined because there was obviously no prejudice.

[27] The question is whether it was unreasonable not to subpoena the robbery victims as defense witnesses. McCleskey's attorney relied primarily on an alibi defense at trial. To establish this defense, the attorney put McCleskey on the stand. He also called several witnesses in an attempt to discredit a Dixie Furniture Store employee's identification of McCleskey and to show that McCleskey's confession was involuntary. It would have undermined his defense if the attorney had called witnesses to testify as to which robber did the shooting. No prejudice can be shown by failing to subpoena witnesses as a reasonable strategy decision.

[28] McCleskey's attorney could have reasonably prepared to cross-examine the State's ballistics expert by reading the expert's report. No in-person interview was necessary. *See Washington v. Watkins*, 655 F.2d 1346, 1358 (5th Cir.1981), *cert. denied*, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982). The report was in the prosecutor's file which the attorney reviewed and no contention has been made that he did not read it.

As to the sentencing phase of his trial, McCleskey asserts his attorney failed to investigate and find character witnesses and did not object to the State's introduction of prior convictions which had been set aside.

[29] No character witnesses testified for McCleskey at his trial. At the State habeas corpus hearing McCleskey's attorney testified he talked with both McCleskey and his sister about potential character witnesses. They suggested no possibilities. The sister refused to testify and advised the attorney that their mother was too sick to travel to the site of the trial. McCleskey and his sister took the stand at the State habeas corpus hearing and told conflicting stories. It is clear from the state court's opinion that it believed the attorney.

> Despite the conflicting evidence on his point, . . . the Court is authorized in its

role as fact finder to conclude that Counsel made all inquiries necessary to present an adequate defense during the sentencing phase. Indeed, Counsel could not present evidence that did not exist. Although this "finding of fact" is stated in terms of the ultimate legal conclusion, implicit in that conclusion is the historical finding that the attorney's testimony was credible. *See Paxton v. Jarvis*, 735 F.2d 1306, 1308 (11th Cir.1984); *Cox v. Montgomery*, 718 F.2d 1036 (11th Cir.1983). This finding of fact is entitled to a presumption of correctness. Based on the facts as testified to by the attorney, he conducted a reasonable investigation for character witnesses.

[30] As evidence of an aggravating circumstance the prosecutor introduced three convictions resulting in life sentences, all of which had been set aside on Fourth Amendment grounds. This evidence could not result in any undue prejudice, because although the convictions were overturned, the charges were not dropped and McCleskey pleaded guilty and received sentences of 18 years. The reduction in sentence was disclosed at trial.

The district court properly denied relief on the ineffectiveness of counsel claim.

DEATH-ORIENTED JURY

[31] Petitioner claims the district court improperly upheld the exclusion of jurors who were adamantly opposed to capital punishment. According to petitioner, this exclusion violated his right to be tried by an impartial and unbiased jury drawn from a representative cross-section of his community. In support of this proposition, petitioner cites two district court opinions from outside circuits. *Grigsby v. Mabry*, 569 F.Supp. 1273 (E.D.Ark.1983), *hearing en banc ordered*, No. 83-2113 E.A. (8th Cir. Nov. 8, 1983) *argued* (March 15, 1984) and *Keeton v. Garrison*, 578 F.Supp. 1164 (W.D.N.C.1984), *rev'd*, 742 F.2d 129 (4th Cir.1984). Whatever the merits of those opinions, they are not controlling authority for this Court.

Because both jurors indicated they would not under any circumstances consider imposing the death penalty, they were properly excluded under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). *See also Boulden v. Holman*, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969). Their exclusion did not violate petitioner's Sixth Amendment rights to an impartial, community-representative jury. *Smith v. Balkcom*, 660 F.2d 573, 582–83 (5th Cir. Unit B 1981), *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982); *Spinkellink v. Wainwright*, 578 F.2d 582, 593–94 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

THE *SANDSTROM* ISSUE

The district court rejected McCleskey's claim that the trial court's instructions to the jury on the issue of intent deprived him of due process by shifting from the prosecution to the defense the burden of proving beyond a reasonable doubt each essential element of the crimes for which he was tried. Such burden-shifting is unconstitutional under *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

McCleskey objects to the following portion of the trial court's instruction to the jury:

> One section of our law says that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but both of these presumptions may be rebutted.

In its analysis of whether this instruction was unconstitutional under *Sandstrom*, the district court examined two recent panel opinions of this Circuit, *Franklin v. Francis*, 720 F.2d 1206 (11th Cir.1983), *cert. granted*, — U.S. —, 104 S.Ct. 2677, 81 L.Ed.2d 873 (1984), and *Tucker v. Francis*, 723 F.2d 1504 (11th Cir.), *op. pet. for reh'g and reh'g en banc*, 729 F.2d 1518 (11th Cir.1984). Even though the jury in

structions in the two cases were identical, *Franklin* held that the language created a mandatory rebuttable persumption violative of *Sandstrom* while *Tucker* held that it created no more than a permissive inference and did not violate *Sandstrom*. Noting that the challenged portion of the instruction used at McCleskey's trial was "virtually identical" to the corresponding portions of the charges in *Franklin* and *Tucker*, the district court elected to follow *Tucker* as this Court's most recent pronouncement on the issue, and it held that *Sandstrom* was not violated by the charge on intent.

Since the district court's decision, the en banc court has heard argument in several cases in an effort to resolve the constitutionality of potentially burden-shifting instructions identical to the one at issue here. *Davis v. Zant*, 721 F.2d 1478 (11th Cir. 1983), *on pet. for reh'g and reh'g en banc*, 728 F.2d 492 (11th Cir.1984); *Drake v. Francis*, 727 F.2d 990 (11th Cir.), *on pet. for reh'g and for reh'g en banc*, 727 F.2d 1003 (11th Cir.1984); *Tucker v. Francis*, 723 F.2d 1504 (11th Cir.), *on pet. for reh'g and reh'g en banc*, 723 F.2d 1518 (11th Cir.1984). The United States Supreme Court has heard oral argument in *Franklin v. Francis*, 53 U.S.L.W. 3373 (U.S. Nov. 20, 1984) [No. 83-1590]. However these cases are decided, for the purpose of this decision, we assume here that the intent instruction in this case violated *Sandstrom* and proceed to the issue of whether that error was harmless.

The Supreme Court requires that "before a federal constitutional error can be harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). More recently, the Supreme Court has divided over the issue of whether the doctrine of harmless error is ever applicable to burden-shifting presumptions violative of *Sandstrom*. Reasoning that "[a]n erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence," a four-justice plurality held that one of the two tests for harmless error employed by this Circuit—whether the evidence of guilt is so overwhelming that the erroneous instruction could not have contributed to the jury's verdict—is inappropriate. *Connecticut v. Johnson*, 460 U.S. 73, 85-87, 103 S.Ct. 969, 976-978, 74 L.Ed.2d 823 (1983). The fifth vote to affirm was added by Justice Stevens, who concurred on jurisdictional grounds. *Id.* at 88, 103 S.Ct. at 978 (Stevens, J., concurring in the judgment). Four other justices, however, criticized the plurality for adopting an "automatic reversal" rule for *Sandstrom* error. *Id.* at 98, 103 S.Ct. at 983 (Powell, J., dissenting). The Supreme Court has subsequently reviewed another case in which harmless error doctrine was applied to a *Sandstrom* violation. The Court split evenly once again in affirming without opinion a Sixth Circuit decision holding that "the prejudicial effect of a *Sandstrom* instruction is largely a function of the defense asserted at trial." *Engle v. Koehler*, 707 F.2d 242, 246 (6th Cir.1983), *aff'd by an equally divided court*, — U.S. —, 104 S.Ct. 1673, 80 L.Ed.2d 1 (1984) (*per curiam*). In *Engle*, the Sixth Circuit distinguished between *Sandstrom* violations where the defendant has claimed nonparticipation in the crime and those where the defendant has claimed lack of *mens rea*, holding that only the latter was so prejudicial as never to constitute harmless error. *Id.* Until the Supreme Court makes a controlling decision on the harmless error question, we continue to apply the standards propounded in our earlier cases.

[32] Since *Sandstrom* was decided in 1979, this Circuit has analyzed unconstitutional burden-shifting instructions to determine whether they constituted harmless error. *See, e.g., Mason v. Balkcom*, 669 F.2d 222, 227 (5th Cir. Unit B 1982). In *Lamb v. Jernigan*, 683 F.2d 1332 (11th Cir.1982), *cert. denied*, 460 U.S. 1024, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983), the Court identified two situations in which an unconstitutional burden-shifting instruction might be harm-

less. First, an erroneous instruction may have been harmless if the evidence of guilt was so overwhelming that the error could not have contributed to the jury's decision to convict. *Lamb*, 683 F.2d at 1342; *Mason*, 669 F.2d at 227. In the case before us, the district court based its finding that the *Sandstrom* violation was harmless on this ground. This Circuit has decided on several occasions that overwhelming evidence of guilt renders a *Sandstrom* violation harmless. *See Jarrell v. Balkcom*, 735 F.2d 1242, 1257 (11th Cir.1984); *Brooks v. Francis*, 716 F.2d 780, 793–94 (11th Cir. 1983), *on pet. for reh'g and for reh'g en banc*, 728 F.2d 1358 (11th Cir.1984); *Spencer v. Zant*, 715 F.2d 1562, 1578 (11th Cir. 1983), *on pet. for reh'g and for reh'g en banc*, 729 F.2d 1293 (11th Cir.1984).

[33] Second, the erroneous instruction may be harmless where the instruction shifts the burden on an element that is not at issue at trial. *Lamb*, 683 F.2d at 1342. This Circuit has adopted this rationale to find a *Sandstrom* violation harmless. *See Drake v. Francis*, 727 F.2d 990, 999 (11th Cir.), *on pet. for reh'g and for reh'g en banc*, 727 F.2d 1003 (11th Cir.1984); *Collins v. Francis*, 728 F.2d 1322, 1330–31 (11th Cir.1984), *pet. for reh'g en banc denied*, 734 F.2d 1481 (11th Cir.1984). There is some indication that even the plurality in *Connecticut v. Johnson* would endorse this type of harmless error in limited circumstances:

> [A] *Sandstrom* error may be harmless if the defendant conceded the issue of intent.... In presenting a defense such as alibi, insanity, or self-defense, a defendant may in some cases admit that the act alleged by the prosecution was intentional, thereby sufficiently reducing the likelihood that the jury applied the erroneous instruction as to permit the appellate court to consider the error harmless.

460 U.S. at 87, 103 S.Ct. at 978 (citations omitted).

Our review of the record reveals that the *Sandstrom* violation in this case is rendered harmless error under this second test. Before discussing whether intent was at issue in McCleskey's trial, however, we note that intent is an essential element of the crime with which he was charged. Georgia law provides three essential elements to the offense of malice murder: (1) a homicide; (2) malice aforethought; and (3) unlawfulness. *Lamb v. Jernigan*, 683 F.2d at 1336. The "malice" element means the intent to kill in the absence of provocation. *Id.* The erroneous instruction on intent, therefore, involved an essential element of the criminal offense charged, and the state was required to prove the existence of that element beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). The question therefore becomes whether McCleskey conceded the element of intent by presenting a defense that admits that the act alleged was intentional.

[34] Of course, a defendant in a criminal trial may rely entirely on the presumption of innocence and the State's burden of proving every element of the crime beyond a reasonable doubt. *Connecticut v. Johnson*, 460 U.S. at 87 n. 16, 103 S.Ct. at 978 n. 16. In such a case, determining whether a defendant had conceded the issue of intent might well be impossible. The record reveals, however, that McCleskey chose not to take that course. Rather, he took the stand at trial and testified that he was not a participant in the Dixie Furniture Store robbery which resulted in the killing of Officer Schlatt. The end of McCleskey's testimony on direct examination summarizes his alibi defense:

> Q Were you at the Dixie Furniture Store that day?
>
> A. No.
>
> Q Did you shoot anyone?
>
> A. No, I didn't.
>
> Q Is everything you have said the truth?
>
> A. Positive.

In closing argument, McCleskey's attorney again stressed his client's alibi defense. He concentrated on undermining the credibility of the eyewitness identifications that

pinpointed McCleskey as the triggerman and on questioning the motives of the other robbery participants who had testified that McCleskey had fired the fatal shots. McCleskey's attorney emphasized that

> if Mr. McCleskey was in the front of the store and Mr. McCleskey had the silver gun and if the silver gun killed the police officer, then he would be guilty. But that is not the circumstances that have been proven.

Although McCleskey's attorney's arguments were consistent with the alibi testimony offered by McCleskey himself, the jury chose to disbelieve that testimony and rely instead on the testimony of eyewitnesses and the other participants in the robbery.

[35, 36] We therefore hold that in the course of asserting his alibi defense McCleskey effectively conceded the issue of intent, thereby rendering the *Sandstrom* violation harmless beyond a reasonable doubt. In so holding, we do not imply that whenever a defendant raises a defense of alibi a *Sandstrom* violation on an intent or malice instruction is automatically rendered harmless error. Nor do we suggest that defendant must specifically argue that intent did not exist in order for the issue of intent to remain before the jury. But where the State has presented overwhelming evidence of an intentional killing and where the defendant raises a defense of nonparticipation in the crime rather than lack of *mens rea*, a *Sandstrom* violation on an intent instruction such as the one at issue here is harmless beyond a reasonable doubt. *See Collins v. Francis*, 728 F.2d at 1331; *Engle v. Koehler*, 707 F.2d at 246.

In this case the officer entered and made it almost to the middle of the store before he was shot twice with a .38 caliber Rossi revolver. The circumstances of this shooting, coupled with McCleskey's decision to rely on an alibi defense, elevate to mere speculation any scenario that would create a reasonable doubt on the issue of intent. The district court properly denied habeas corpus relief on this issue.

CONCLUSION

The judgment of the district court in granting the petition for writ of habeas corpus is reversed and the petition is hereby denied.

REVERSED and RENDERED.

TJOFLAT, Circuit Judge, concurring:

I concur in the court's opinion, though I would approach the question of the constitutional application of the death penalty in Georgia somewhat differently. I would begin with the established proposition that Georgia's capital sentencing model is facially constitutional. It contains the safeguards necessary to prevent arbitrary and capricious decision making, including decisions motivated by the race of the defendant or the victim. These safeguards are present in every stage of a capital murder prosecution in Georgia, from the grand jury indictment through the execution of the death sentence. Some of these safeguards are worth repeating.

At the indictment stage, the accused can insist that the State impanel a grand jury that represents a fair cross section of the community, as required by the sixth and fourteenth amendments, and that the State not deny a racial group, in violation of the equal protection clause of the fourteenth amendment, the right to participate as jurors. In Georgia this means that a representative portion of blacks will be on the grand jury.

The same safeguards come into play in the selection of the accused's petit jury. In addition, the accused can challenge for cause any venireman found to harbor a racial bias against the accused or his victim. The accused can peremptorily excuse jurors suspected of such bias and, at the same time, prevent the prosecutor from exercising his peremptory challenges in a way that systematically excludes a particular class of persons, such as blacks, from jury service. *See e.g., Willis v. Zant*, 720 F.2d 1212 (11th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 3548, 82 L.Ed.2d 851 (1984).

If the sentencer is the jury, as it is in Georgia (the trial judge being bound by the jury's recommendation), it can be instructed to put aside racial considerations in reaching its sentencing recommendation. If the jury recommends the death sentence, the accused, on direct appeal to the Georgia Supreme Court, can challenge his sentence on racial grounds as an independent assignment of error or in the context of proportionality review. And, if the court affirms his death sentence, he can renew his challenge in a petition for rehearing or by way of collateral attack.

In assessing the constitutional validity of Georgia's capital sentencing scheme, one could argue that the role of the federal courts—the Supreme Court on certiorari from the Georgia Supreme Court and the entire federal judicial system in habeas corpus review—should be considered. For they provide still another layer of safeguards against the arbitrary and capricious imposition of the death penalty.

Petitioner, in attacking his conviction and death sentence, makes no claim that either was motivated by a racial bias in any stage of *his* criminal prosecution. His claim stems solely from what has transpired in other homicide prosecutions. To the extent that his data consists of cases in which the defendant's conviction and sentence—whether a sentence to life imprisonment or death—is constitutionally unassailable, the data, I would hold, indicates no invidious racial discrimination as a matter of law. To the extent that the data consists of convictions and/or sentences that are constitutionally infirm, the data is irrelevant. In summary, petitioner's data, which shows nothing more than disproportionate sentencing results, is not probative of a racially discriminatory motive on the part of any of the participants in Georgia's death penalty sentencing model—either in petitioner's or any other case.

1. I have not addressed the due process analysis employed by the district court because the petitioner did not rely on it in his brief.

VANCE, Circuit Judge, concurring:

Although I concur in Judge Roney's opinion, I am troubled by its assertion that there is "little difference in the proof that might be required to prevail" under either eighth amendment or fourteenth amendment equal protection claims of the kind presented here[1]. According to *Furman*, an eighth amendment inquiry centers on the general results of capital sentencing systems, and condemns those governed by such unpredictable factors as chance, caprice or whim. An equal protection inquiry is very different. It centers not on systemic irrationality, but rather the independent evil of intentional, invidious discrimination against given individuals.

I am conscious of the dicta in the various *Furman* opinions which note with disapproval the possibility that racial discrimination was a factor in the application of the death penalty under the Georgia and Texas statutes then in effect. To my mind, however, such dicta merely indicate the possibility that a system that permits the exercise of standardless discretion not only may be capricious, but may give play to discriminatory motives which violate equal protection standards as well. Whether a given set of facts make out an eighth amendment claim of systemic irrationality under *Furman* is, therefore, a question entirely independent of whether those facts establish deliberate discrimination violative of the equal protection clause.

I am able to concur because in neither the case before us nor in any of the others presently pending would the difference influence the outcome. As Judge Roney points out, petitioner's statistics are insufficient to establish intentional discrimination in the capital sentence imposed in his case. As to the eighth amendment, I doubt that a claim of arbitrariness or caprice is even presented, since petitioner's case is entirely devoted to proving that the death penalty is being applied in an altogether explicable—albeit impermissible—fashion.

Claims such as that of petitioner are now presented with such regularity that we may reasonably hope for guidance from the Supreme Court by the time my expressed concerns are outcome determinative in a given case.

KRAVITCH, Circuit Judge, concurring:

I concur in the majority opinion except as to the *Giglio* issue. In my view, for reasons stated in Chief Judge Godbold's dissent, the facts surrounding Evans' testimony did constitute a *Giglio* violation. I agree with the majority, however, that any error was harmless beyond a reasonable doubt.

I also join Judge Anderson's special concurrence on the "Constitutional Application of the Georgia Death Penalty."

R. LANIER ANDERSON, III, Circuit Judge, concurring with whom KRAVITCH, Circuit Judge, joins as to the constitutional application of the Georgia Death Statute:

I join Judge Roney's opinion for the majority, and write separately only to emphasize, with respect to the Part entitled "Constitutional Application of Georgia's Death Penalty," that death is different in kind from all other criminal sanctions. *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). Thus, the proof of racial motivation required in a death case, whether pursuant to an Eighth Amendment theory or an equal protection theory, presumably would be less strict than that required in civil cases or in the criminal justice system generally. Constitutional adjudication would tolerate less risk that a death sentence was influenced by race. The Supreme Court's Eighth Amendment jurisprudence has established a constitutional supervision over the conduct of state death penalty systems which is more exacting than that with respect to the criminal justice system generally. *Woodson v. North Carolina*, *id.* at 305, 96 S.Ct. at 2991 ("Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment."). There is no need in this case, however, to reach out and try to define more precisely what evidentiary showing would be required. Judge Roney's opinion demonstrates with clarity why the evidentiary showing in this case is insufficient.

GODBOLD, Chief Judge, dissenting in part, and concurring in part, with whom JOHNSON, HATCHETT and CLARK, Circuit Judges, join as to the dissent on the *Giglio* issue*:

At the merits trial Evans, who had been incarcerated with McCleskey, testified that McCleskey admitted to him that he shot the policeman and acknowledged that he wore makeup to disguise himself during the robbery. Evans also testified that he had pending against him a [federal] escape charge, that he had not asked the prosecutor to "fix" this charge, and that the prosecutor had not promised him anything to testify.

At the state habeas hearing the following transpired:

> The Court: Mr. Evans, let me ask you a question. At the time that you testified in Mr. McCleskey's trial, had you been promised anything in exchange for your testimony?
>
> The witness: No, I wasn't. I wasn't promised nothing about—I wasn't promised nothing by the D.A. But the Detective told me that he would—he said he was going to do it himself, speak a word for me. That was what the Detective told me.
>
> By Mr. Stroup:
>
> Q. The Detective told you that he would speak a word for you?
>
> A. Yeah.
>
> Q. That was Detective Dorsey?
>
> A. Yeah.

State Habeas Transcript at 122.

The district court granted habeas relief to McCleskey under *Giglio v. U.S.*, 405

* I dissent on only the *Giglio* issue. I concur in Judge Roney's opinion on all other issues.

U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). At the threshold the district court pointed out that *Giglio* applies not only to "traditional deals" made by the prosecutor in exchange for testimony but also to "any promises or understandings made by any member of the prosecutorial team, which includes police investigators." 580 F.Supp. at 380. The court then made these subsidiary findings: (1) that Evans's testimony was highly damaging; (2) that "the jury was clearly left with the impression that Evans was unconcerned about any charges which were pending against him and that no promises had been made which would affect his credibility," *id.* at 381; (3) that at petitioner's state habeas hearings Evans testified "that one of the detectives investigating the case had promised to speak to federal authorities on his behalf," *id.*; (4) that the escape charges pending against Evans were dropped subsequent to McCleskey's trial.

The en banc court seems to me to err on several grounds. It blurs the proper application of *Giglio* by focusing sharply on the word "promise." The proper inquiry is not limited to formal contracts, unilateral or bilateral, or words of contract law, but "to ensure that the jury knew the facts that might motivate a witness in giving testimony." *Smith v. Kemp*, 715 F.2d 1459, 1467 (11th Cir.1983). *Giglio* reaches the informal understanding as well as the formal. The point is, even if the dealings are informal, can the witness reasonably view the government's undertaking as offering him a benefit and can a juror knowing of it reasonably view it as motivating the witness in giving testimony? The verbal undertaking made in this instance by an investigating state officer, who is a member of the prosecution team, that he will "put in a word for him" on his pending federal charge was an undertaking that a jury was entitled to know about.

Second, the en banc court finds the benefit too marginal. Of course, the possible benefit to a potential witness can be so minimal that a court could find as a matter of law no *Giglio* violation occurred. A trivial offer is not enough. The subject matter of the offer to Evans was substantial, or at least a jury was entitled to consider it so. After McCleskey was tried and convicted, the federal charge was dropped.

Third, the court concludes there was no reasonable likelihood that Evans's testimony affected the judgment of the jury. Co-defendant Wright was the only eyewitness. He was an accomplice, thus his testimony, unless corroborated, was insufficient to establish that McCleskey was the triggerman. The en banc court recognizes this problem but avoids it by holding that Wright's testimony was corroborated by "McCleskey's own confession." This could refer to either of two admissions of guilt by McCleskey. He "confessed" to Wright, but Wright's testimony on this subject could not be used to corroborate Wright's otherwise insufficient accomplice testimony. Testimony of an accomplice cannot be corroborated by the accomplice's own testimony. The other "confession" was made to Evans and testified to by Evans. Thus Evans is not a minor or incidental witness. Evans' testimony describing what McCleskey "confessed" to him, is the corroboration for the testimony of the only eyewitness, Wright. And that eyewitness gave the only direct evidence that McCleskey killed the officer.

The district court properly granted the writ on *Giglio* grounds. Its judgment should be affirmed.

JOHNSON, Circuit Judge, dissenting in part and concurring in part, with whom HATCHETT and CLARK, Circuit Judges join:

Warren McCleskey has presented convincing evidence to substantiate his claim that Georgia has administered its death penalty in a way that discriminates on the basis of race. The Baldus Study, characterized as "far and away the most complete and thorough analysis of sentencing" ever carried out,[1] demonstrates that in Georgia

1. This was the description given at trial by Dr. Richard Berk, member of a panel of the Nation-

a person who kills a white victim has a higher risk of receiving the death penalty than a person who kills a black victim. Race alone can explain part of this higher risk. The majority concludes that the evidence "confirms rather than condemns the system" and that it fails to support a constitutional challenge. I disagree. In my opinion, this disturbing evidence can and does support a constitutional claim under the Eighth Amendment. In holding otherwise, the majority commits two critical errors: it requires McCleskey to prove that the State intended to discriminate against him personally and it underestimates what his evidence actually did prove. I will address each of these concerns before commenting briefly on the validity of the Baldus Study and addressing the other issues in this case.

I. THE EIGHTH AMENDMENT AND RACIAL DISCRIMINATION IN THE ADMINISTRATION OF THE DEATH PENALTY

McCleskey claims that Georgia administers the death penalty in a way that discriminates on the basis of race. The district court opinion treated this argument as one arising under the Fourteenth Amendment[2] and explicitly rejected the petitioner's claim that he could raise the argument under the Eighth Amendment, as well. The majority reviews each of these possibilities and concludes that there is little difference in the proof necessary to prevail under any of the theories: whatever the constitutional source of the challenge, a petitioner must show a disparate impact great enough to compel the conclusion that purposeful discrimination permeates the system. These positions reflect a misunderstanding of the nature of an Eighth Amendment claim in the death penalty context: the Eighth Amendment prohibits the racially discriminatory application of the death penalty and McCleskey does not have to prove intent to discriminate in order to show that the death penalty is being applied arbitrarily and capriciously.

A. The Viability of an Eighth Amendment Challenge

As the majority recognizes, the fact that a death penalty statute is facially valid does not foreclose an Eighth Amendment challenge based on the systemwide application of that statute. The district court most certainly erred on this issue. Applying the death penalty in a racially discriminatory manner violates the Eighth Amendment. Several members of the majority in *Furman v. Georgia*, 408 U.S. 238, 245–57, 310, 364–65, 92 S.Ct. 2726, 2729–36, 2762, 2790–91, 33 L.Ed.2d 346 (1972) (concurring opinions of Douglas, Stewart, Marshall, JJ.), relied in part on the disproportionate impact of the death penalty on racial minorities in concluding that the death penalty as then administered constituted arbitrary and capricious punishment.

When decisionmakers look to the race of a victim, a factor completely unrelated to the proper concerns of the sentencing process enters into determining the sentence. Reliance on the race of the victim means that the sentence is founded in part on a morally and constitutionally repugnant judgment regarding the relative low value of the lives of black victims. *Cf. Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (listing race of defendant as a factor "constitutionally impermissible or totally irrelevant to the sentencing process"). There is no legitimate basis in reason for relying on race in the sentencing process. Because the use of race is both irrelevant to sentencing and impermissible, sentencing determined in part by race is arbitrary and capricious and therefore a

al Academy of Sciences charged with reviewing all previous research on criminal sentencing issues in order to set standards for the conduct of such research.

2. The district court felt bound by precedent to analyze the claim under the equal protection clause, but expressed the opinion that it might best be understood as a due process claim. It does not appear that a different constitutional basis for the claim would have affected the district court's conclusions.

violation of the Eighth Amendment. *See Furman v. Georgia*, 408 U.S. 238, 256, 92 S.Ct. 2726, 2735, 33 L.Ed.2d 346 (1972) (Douglas, J., concurring) ("the high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups").

B. The Eighth Amendment and Proof of Discriminatory Intent

The central concerns of the Eighth Amendment deal more with decisionmaking processes and groups of cases than with individual decisions or cases. In a phrase repeated throughout its later cases, the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 195 n. 46, 96 S.Ct. 2909, 2935 n. 46, 49 L.Ed.2d 859 (1976) (plurality opinion), stated that a "pattern of arbitrary and capricious sentencing" would violate the Eighth Amendment. In fact, the Court has consistently adopted a systemic perspective on the death penalty, looking to the operation of a state's entire sentencing structure in determining whether it inflicted sentences in violation of the Eighth Amendment. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 875, 71 L.Ed.2d 1 (1982) (capital punishment must be imposed "fairly, and with reasonable consistency, or not at all"); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty").

Without this systemic perspective, review of sentencing would be extremely limited, for the very idea of arbitrary and capricious sentencing takes on its fullest meaning in a comparative context. A nonarbitrary sentencing structure must provide some meaningful way of distinguishing between those who receive the death sentence and those who do not. *Godfrey v. Georgia*, 446 U.S. 420, 433, 100 S.Ct. 1759, 1767, 64 L.Ed.2d 398 (1980); *Furman v. Georgia*, 408 U.S. 238, 313, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 (1972) (White, J., concurring). Appellate proportionality review is not needed in every case but consistency is still indispensable to a constitutional sentencing system.[3] The import of any single sentencing decision depends less on the intent of the decisionmaker than on the outcome in comparable cases. Effects evidence is well suited to this type of review.

This emphasis on the outcomes produced by the entire system springs from the State's special duty to insure fairness with regard to something as serious as a death sentence. *See Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 2741, 77 L.Ed.2d 235 (1983); *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion). Monitoring patterns of sentences offers an especially effective way to detect breaches of that duty. Indeed, because the death penalty retains the need for discretion to make individualized judgments while at the same time heightening the need for fairness and consistency, *Eddings v. Oklahoma*, *supra*, 455 U.S. at 110–12, 102 S.Ct. at 874–75, patterns of decisions may often be the only acceptable basis of review. Discretion hinders inquiry into intent: if unfairness and inconsistency are to be detected even when they are not overwhelming or obvious, effects evidence must be relied upon.

Insistence on systemwide objective standards to guide sentencing reliably prevents aberrant decisions without having to probe the intentions of juries or other decisionmakers. *Gregg v. Georgia*, *supra*, 428

3. The Supreme Court in *Pulley v. Harris*, — U.S. —, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), emphasized the importance of factors other than appellate proportionality review that would control jury discretion and assure that sentences would not fall into an arbitrary pattern. The decision in *Pulley* deemphasizes the importance of evidence of arbitrariness in individual cases and looks exclusively to "systemic" arbitrariness. The case further underscores this court's responsibility to be alert to claims, such as the one McCleskey makes, that allege more than disproportionality in a single sentence.

U.S. at 198, 96 S.Ct. at 2936; *Woodson v. North Carolina*, *supra*, 428 U.S. at 303, 96 S.Ct. at 2990 (objective standards necessary to "make rationally reviewable the process for imposing the death penalty"). The need for the State to constrain the discretion of juries in the death penalty area is unusual by comparison to other areas of the law. It demonstrates the need to rely on systemic controls as a way to reconcile discretion and consistency; the same combined objectives argue for the use of effects evidence rather than waiting for evidence of improper motives in specific cases.

Objective control and review of sentencing structures is carried so far that a jury or other decisionmaker may be presumed to have intended a non-arbitrary result when the outcome is non-arbitrary by an objective standard: the law, in short, looks to the result rather than the actual motives.[4] In *Westbrook v. Zant*, 704 F.2d 1487, 1504 (11th Cir.1983), this Court held that, even though a judge might not properly instruct a sentencing jury regarding the proper definition of aggravating circumstances, the "uncontrolled discretion of an uninstructed jury" can be cured by review in the Georgia Supreme Court. The state court must find that the record shows the presence of statutory aggravating factors that a jury could have relied upon. If the factors are present in the record it does not matter that the jury may have misunderstood the role of aggravating circumstances. If the State can unintentionally succeed in preventing arbitrary and capricious sentencing, it would seem that the State can also fail in its duty even though none of the relevant decisionmakers intend such a failure.[5]

In sum, the Supreme Court's systemic and objective perspective in the review and control of death sentencing indicates that a pattern of death sentences skewed by race alone will support a claim of arbitrary and capricious sentencing in violation of the Eighth Amendment. *See Furman v. Georgia*, 408 U.S. 238, 253, 92 S.Ct. 2726, 2733, 33 L.Ed.2d 346 (1972) (Douglas, J., concurring) ("We cannot say that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties."). The majority's holding on this issue conflicts with every other constitutional limit on the death penalty. After today, in this Circuit arbitrariness based on race will be more difficult to

4. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and other cases demonstrate that the actual deliberations of the sentencer are relevant under the Eighth Amendment, for mitigating factors must have their proper place in all deliberations. But the sufficiency of intent in proving an Eighth Amendment violation does not imply the necessity of intent for all such claims.

5. The only Fifth or Eleventh Circuit cases touching on the issue of discriminatory intent under the Eighth Amendment appear to be inconsistent with the Supreme Court's approach and therefore wrongly decided. The court in *Smith v. Balkcom*, 660 F.2d 573, 584 (5th Cir. Unit B 1981), *modified*, 671 F.2d 858 (5th Cir.1982), stated that Eighth Amendment challenges based on race require a showing of intent, but the court reached this conclusion because it wrongly believed that *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978), compelled such a result. The *Spinkellink* court never reached the question of intent, holding that Supreme Court precedent foreclosed all Eighth Amendment challenges except for extreme cases where the sentence is shockingly disproportionate to the crime. 578 F.2d at 606 & n. 28. *See supra* note 3. The *Smith* court cites to a portion of the *Spinkellink* opinion dealing with equal protection arguments. 578 F.2d at 614 n. 40. Neither of the cases took note of the most pertinent Eighth Amendment precedents decided by the Supreme Court.

Other Eleventh Circuit cases mention that habeas corpus petitioners must prove intent to discriminate racially against them personally in the application of the death sentence. But these cases all either treat the claim as though it arose under the Fourteenth Amendment alone or rely on *Smith* or one of its successors. *See Sullivan v. Wainwright*, 721 F.2d 316 (11th Cir.1983); *Adams v. Wainwright*, 709 F.2d 1443 (11th Cir.1983). Of course, to the extent these cases attempt to foreclose Eighth Amendment challenges of this sort or require proof of particularized intent to discriminate, they are inconsistent with the Supreme Court's interpretation of the Eighth Amendment. *Cf. Gates v. Collier*, 501 F.2d 1291, 1300–01 (5th Cir.1974) (prohibition against cruel and unusual punishment "is not limited to specific acts directed at selected individuals").

eradicate than any other sort of arbitrariness in the sentencing system.

II. PROVING DISCRIMINATORY EFFECT AND INTENT WITH THE BALDUS STUDY

The statistical study conducted by Dr. Baldus provides the best possible evidence of racially disparate impact. It began with a single unexplained fact: killers of white victims in Georgia over the last decade have received the death penalty eleven times more often than killers of black victims.[6] It then employed several statistical techniques, including regression analysis, to isolate the amount of that disparity attributable to both racial and non-racial factors. Each of the techniques yielded a statistically significant racial influence of at least six percent; in other words, they all showed that the pattern of sentencing could only be explained by assuming that the race of the victim made all defendants convicted of killing white victims at least six percent more likely to receive the death penalty. Other factors[7] such as the number of aggravating circumstances or the occupation of the victim could account for some of the eleven-to-one differential, but the race of the victim remained one of the strongest influences.

Assuming that the study actually proves what it claims to prove, an assumption the majority claims to make, the evidence undoubtedly shows a disparate impact. Regression analysis has the great advantage of showing that a perceived racial effect is an actual racial effect because it controls for the influence of non-racial factors. By screening out non-racial explanations for certain outcomes, regression analysis offers a type of effects evidence that approaches evidence of intent, no matter what level of disparity is shown. For example, the statistics in this case show that a certain number of death penalties were probably imposed *because* of race, without ever inquiring directly into the motives of jurors or prosecutors.

Regression analysis is becoming a common method of proving discriminatory effect in employment discrimination suits. In fact, the Baldus Study shows effects at least as dramatic and convincing as those in statistical studies offered in the past. *Cf. Segar v. Smith*, 738 F.2d 1249 (D.C.Cir. 1984); *Wade v. Mississippi Cooperative Extension Service*, 528 F.2d 508 (5th Cir. 1976). Nothing more should be necessary to prove that Georgia is applying its death penalty statute in a way that arbitrarily and capriciously relies on an illegitimate factor—race.[8]

Even if proof of discriminatory intent were necessary to make out a constitutional challenge, under any reasonable definition of intent the Baldus Study provides sufficient proof. The majority ignores the fact that McCleskey has shown discriminatory intent at work in the sentencing system even though he has not pointed to any specific act or actor responsible for discriminating against him in particular.[9]

The law recognizes that even though intentional discrimination will be difficult to detect in some situations, its workings are still pernicious and real. *Rose v. Mitchell*, 443 U.S. 545, 559, 99 S.Ct. 2993, 3001, 61 L.Ed.2d 739 (1979). Under some circumstances, therefore, proof of discriminatory effect will be an important first step in

6. Among those who were eligible for the death penalty, eleven percent of the killers of white victims received the death penalty, while one percent of the killers of black victims received it.

7. In one of the largest of these models, the one focused on by the district court and the majority, the statisticians used 230 different independent variables (possible influences on the pattern of sentencing), including several different aggravating and many possible mitigating factors.

8. *See* part I, *supra*. Of course, proof of any significant racial effects is enough under the Eighth Amendment, for a requirement of proving large or pervasive effects is tantamount to proof of intent.

9. The same factors leading to the conclusion that an Eighth Amendment claim does not require proof of intent militate even more strongly against using too restrictive an understanding of intent.

proving intent. *Crawford v. Board of Education*, 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982), and may be the best available proof of intent. *Washington v. Davis*, 426 U.S. 229, 241–42, 96 S.Ct. 2040, 2048–49, 48 L.Ed.2d 597 (1976); *United States v. Texas Educational Agency*, 579 F.2d 910, 913–14 & nn. 5–7 (5th Cir.1978), *cert. denied*, 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 879 (1979).

For instance, proof of intentional discrimination in the selection of jurors has traditionally depended on showing racial effects. *See Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 532 (1970); *Gibson v. Zant*, 705 F.2d 1543 (11th Cir.1983). This is because the discretion allowed to jury commissioners, although legitimate, could easily be used to mask conscious or unconscious racial discrimination. The Supreme Court has recognized that the presence of this sort of discretion calls for indirect methods of proof. *Washington v. Davis*, 426 U.S. 229, 241–42, 96 S.Ct. 2040, 2048–49, 48 L.Ed.2d 597 (1976); *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266 n. 13, 97 S.Ct. 555, 564 n. 13, 50 L.Ed.2d 450 (1977).

This Court has confronted the same problem in an analogous setting. In *Searcy v. Williams*, 656 F.2d 1003, 1006–09 (5th Cir. 1981), *aff'd sub nom. Hightower v. Searcy*, 455 U.S. 984, 102 S.Ct. 1606, 71 L.Ed.2d 844 (1982), the court overturned a facially valid procedure for selecting school board members because the selections fell into an overwhelming pattern of racial imbalance. The decision rested in part on the discretion inherent in the selection process: "The challenged application of the statute often involves discretion or subjective criteria utilized at a crucial point in the decision-making process."

The same concerns at work in the jury discrimination context operate with equal force in the death penalty context. The prosecutor has considerable discretion and the jury has bounded but irreducible discretion. Defendants cannot realistically hope to find direct evidence of discriminatory intent. This is precisely the situation envisioned in *Arlington Heights*, where the Court pointed out that "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.... The evidentiary inquiry is then relatively easy." 429 U.S. at 266, 97 S.Ct. at 564.

As a result, evidence of discriminatory effects presented in the Baldus Study, like evidence of racial disparities in the composition of jury pools[10] and in other contexts,[11] excludes every reasonable inference other than discriminatory intent at work in the system. This Circuit has acknowledged on several occasions that evidence of this sort could support a constitutional challenge. *Adams v. Wainwright*, 709 F.2d 1443, 1449 (11th Cir.1983); *Smith v. Balkcom*, 660 F.2d 573 (5th Cir. Unit B 1981), *modified in part*, 671 F.2d 858, *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982); *Spinkellink*, *supra*, at 614.

A petitioner need not exclude all inferences other than discriminatory intent in his or her particular case.[12] Yet the major-

10. The majority distinguishes the jury discrimination cases on tenuous grounds, stating that the disparity between the number of minority persons on the jury venire and the number of such persons in the population is an "*actual* disparity," while the racial influence in this case is not. If actual disparities are to be considered, then the court should employ the actual (and overwhelming) eleven-to-one differential between white victim cases and black victim cases. The percentage figures presented by the Baldus Study are really more reliable than "actual" disparities because they control for possible non-racial factors.

11. *United States v. Texas Educational Agency*, 579 F.2d 910 (5th Cir.1978), *cert. denied*, 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 879 (1979), involving a segregated school system, provides another example of effects evidence as applied to an entire decisionmaking system.

12. The particularity requirement has appeared sporadically in this Court's decisions prior to this time, although it was not a part of the original observation about this sort of statistical evidence in *Smith v. Balkcom*, *supra*.

ity improperly stresses this particularity requirement and interprets it so as to close a door left open by the Supreme Court.[13] It would be nearly impossible to prove through evidence of a system's usual effects that intent must have been a factor in any one case; effects evidence, in this context, necessarily deals with many cases at once. Every jury discrimination charge would be stillborn if the defendant had to prove by direct evidence that the jury commissioners intended to deprive him or her of the right to a jury composed of a fair cross-section of the community. Requiring proof of discrimination in a particular case is especially inappropriate with regard to an Eighth Amendment claim, for even under the majority's description of the proof necessary to sustain an Eighth Amendment challenge, race operating in a pervasive manner "in the system" will suffice.

The majority, after sowing doubts of this sort, nevertheless concedes that despite the particularity requirement, evidence of the system's effects could be strong enough to demonstrate intent and purpose.[14] Its subsequent efforts to weaken the implications to be drawn from the Baldus Study are uniformly unsuccessful.

For example, the majority takes comfort in the fact that the level of aggravation powerfully influences the sentencing decision in Georgia. Yet this fact alone does not reveal a "rational" system at work. The statistics not only show that the number of aggravating factors is a significant influence; they also point to the race of the victim as a factor of considerable influence. Where racial discrimination contributes to an official decision, the decision is unconstitutional even though discrimination was not the primary motive. *Personnel Administrator v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979).

Neither can the racial impact be explained away by the need for discretion in the administration of the death penalty or by any "presumption that the statute is operating in a constitutional manner." The discretion necessary to the administration of the death penalty does not include the discretion to consider race: the jury may consider any proper aggravating factors, but it may not consider the race of the victim as an aggravating factor. *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 2741, 77 L.Ed.2d 235 (1983). And a statute deserves a presumption of constitutionality only where there is real uncertainty as to whether race influences its application. Evidence such as the Baldus Study, showing that the pattern of sentences can only be explained by assuming a significant racial influence,[15] overcomes whatever presumption exists.

The majority's effort to discount the importance of the "liberation hypothesis" also fails. In support of his contention that juries were more inclined to rely on race when other factors did not militate toward one outcome or another, Dr. Baldus noted that a more pronounced racial influence appeared in cases of medium aggravation

13. The dissenting opinion of Justice Powell in *Stephens v. Kemp*, — U.S. —, 104 S.Ct. 562, 78 L.Ed.2d 370, 372 (1984), does not undermine the clear import of cases such as the jury discrimination cases. For one thing, a dissent from a summary order does not have the precedential weight of a fully considered opinion of the Court. For another, the *Stephens* dissent considered the Baldus Study as an equal protection argument only and did not address what might be necessary to prove an Eighth Amendment violation.

14. While I agree with Judge Anderson's observation that "the proof of racial motivation required in a death case ... would be less strict than that required in civil cases or in the criminal justice system generally," I find it inconsistent with his acceptance of the majority outcome. The "exacting" constitutional supervision over the death penalty established by the Supreme Court compels the conclusion that discriminatory effects can support an Eighth Amendment challenge. Furthermore, the majority's evaluation of the evidence in this case is, if anything, *more* strict than in other contexts. See note 10, *supra*.

15. The racial influence operates in the average case and is therefore probably at work in any single case. The majority misconstrues the nature of regression analysis when it says that the coefficient of the race-of-the-victim factor represents the percentage of cases in which race could have been a factor. That coefficient represents the influence of race across all the cases.

(20 percent) than in all cases combined (6 percent). The majority states that racial impact in a subset of cases cannot provide the basis for a systemwide challenge. However, there is absolutely no justification for such a claim. The fact that a system mishandles a sizeable subset of cases is persuasive evidence that the entire system operates improperly. *Cf. Connecticut v. Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1984) (written test discriminates against some employees); *Lewis v. City of New Orleans*, 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974) (statute infringing on First Amendment interests in some cases). A system can be applied arbitrarily and capriciously even if it resolves the obvious cases in a rational manner. Admittedly, the lack of a precise definition of medium aggravation cases could lead to either an overstatement or understatement of the racial influence. Accepting, however, that the racial factor is accentuated to some degree in the middle range of cases,[16] the evidence of racial impact must be taken all the more seriously.

Finally, the majority places undue reliance on several recent Supreme Court cases. It argues that *Ford v. Strickland*, — U.S. —, 104 S.Ct. 3498, 82 L.Ed.2d 911 (1984), *Adams v. Wainwright*, — U.S. —, 104 S.Ct. 2183, 80 L.Ed.2d 809 (1984), and *Sullivan v. Wainwright*, — U.S. —, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983), support its conclusion that the Baldus Study does not make a strong enough showing of effects to justify an inference of intent. But to the extent that these cases offer any guidance at all regarding the legal standards applicable to these studies,[17] it is clear that the Court considered the validity of the studies rather than their sufficiency. In *Sullivan*, the Supreme Court refused to stay the execution simply because it agreed with the decision of this Court, a decision based on the validity of the study alone.[18] *Sullivan v. Wainwright*, 721 F.2d 316 (11th Cir.1983) (citing prior cases rejecting statistical evidence because it did not account for non-racial explanations of the effects). As the majority mentions, the methodology of the Baldus Study easily surpasses that of the earlier studies involved in those cases.

Thus, the Baldus Study offers a convincing explanation of the disproportionate effects of Georgia's death penalty system. It shows a clear pattern of sentencing that can only be explained in terms of race, and it does so in a context where direct evidence of intent is practically impossible to obtain. It strains the imagination to believe that the significant influence on sentencing left unexplained by 230 alternative factors is random rather than racial, especially in a state with an established history of racial discrimination. *Turner v. Fouche*, *supra*; *Chapman v. King*, 154 F.2d 460 (5th Cir.), *cert. denied*, 327 U.S. 800, 66 S.Ct. 905, 90 L.Ed. 1025 (1946). The petitioner has certainly presented evidence of intentional racial discrimination at work in the Georgia system. Georgia has within the meaning of the Eighth Amendment applied its statute arbitrarily and capriciously.

III. THE VALIDITY OF THE BALDUS STUDY

The majority does not purport to reach the issue of whether the Baldus Study reliably proves what it claims to prove. However, the majority does state that the district court's findings regarding the validity

16. The majority apparently ignores its commitment to accept the validity of the Baldus Study when it questions the definition of "medium aggravation cases" used by Dr. Baldus.

17. The opinion in *Ford* mentioned this issue in a single sentence; the order in *Adams* was not accompanied by any written opinion at all. None of the three treated this argument as a possible Eighth Amendment claim. Finally, the "death odds multiplier" is not the most pronounced statistic in the Baldus Study; a ruling of insufficiency based on that one indicator would not be controlling here.

18. Indeed, the Court indicated that it would have reached a different conclusion if the district court and this court had not been given the opportunity to analyze the statistics adequately. — U.S. —, 104 S.Ct. at 451, n. 3, 78 L.Ed.2d at 213, n. 3.

of the study might foreclose habeas relief on this issue. Moreover, the majority opinion in several instances questions the validity of the study while claiming to be interested in its sufficiency alone. I therefore will summarize some of the reasons that the district court was clearly erroneous in finding the Baldus Study invalid.

The district court fell victim to a misconception that distorted its factual findings. The Court pointed out a goodly number of imperfections in the study but rarely went ahead to determine the significance of those imperfections. A court may not simply point to flaws in a statistical analysis and conclude that it is completely unreliable or fails to prove what it was intended to prove. Rather, the Court must explain why the imperfection makes the study less capable of proving the proposition that it was meant to support. *Eastland v. Tennessee Valley Authority*, 704 F.2d 613 (11th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 1415, 79 L.Ed.2d 741 (1984).

Several of the imperfections noted by the district court were not legally significant because of their minimal effect. Many of the errors in the data base match this description. For instance, the "mismatches" in data entered once for cases in the Procedural Reform Study and again for the same cases in the Charging and Sentencing Study were scientifically negligible. The district court relied on the data that changed from one study to the next in concluding that the coders were allowed too much discretion. But most of the alleged "mismatches" resulted from intentional improvements in the coding techniques and the remaining errors [19] were not large enough to affect the results.

The data missing in some cases was also a matter of concern for the district court. The small effects of the missing data leave much of that concern unfounded. The race of the victim was uncertain in 6% of the cases at most [20]; penalty trial information was unavailable in the same percentage of cases.[21] The relatively small amount of missing data, combined with the large number of variables used in several of the models, should have led the court to rely on the study. Statistical analyses have never been held to a standard of perfection or near perfection in order for courts to treat them as competent evidence. *Trout v. Lehman*, 702 F.2d 1094, 1101–02 (D.C.Cir. 1983). Minor problems are inevitable in a study of this scope and complexity: the stringent standards used by the district court would spell the loss of most statistical evidence.

Other imperfections in the study were not significant because there was no reason to believe that the problem would work systematically to expand the size of the race-of-the-victim factor rather than to contract it or leave it unchanged. The multicollinearity problem is a problem of notable proportions that nonetheless did not increase the size of the race-of-the-victim factor.[22] Ideally the independent variables in

19. The remaining errors affected little more than one percent of the data in any of the models. Data errors of less than 10 or 12% generally do not threaten the validity of a model.

20. Dr. Baldus used an "imputation method," whereby the race of the victim was assumed to be the same as the race of the defendant. Given the predominance of murders where the victim and defendant were of the same race, this method was a reasonable way of estimating the number of victims of each race. It further reduced the significance of this missing data.

21. The district court, in assessing the weight to be accorded this omission, assumed that Dr. Baldus was completely unsuccessful in predicting how many of the cases led to penalty trials. Since the prediction was based on discernible trends in the rest of the cases, the district court was clearly erroneous to give no weight to the prediction.

22. The treatment of the coding conventions provides another example. The district court criticized Dr. Baldus for treating "U" codes (indicating uncertainty as to whether a factor was present in a case) as being beyond the knowledge of the jury and prosecutor ("absent") rather than assuming that the decisionmakers knew about the factor ("present"). Baldus contended that, if the extensive records available on each case did not disclose the presence of a factor, chances were good that the decisionmakers did not know of its presence, either. Dr. Berk testi-

a regression analysis should not be related to one another. If one independent variable merely serves as a proxy for another, the model suffers from "multicollinearity." That condition could either reduce the statistical significance of the variables or distort their relationships to one another. Of course, to the extent that multicollinearity reduces statistical significance it suggests that the racial influence would be even more certain if the multicollinearity had not artificially depressed the variable's statistical significance. As for the distortions in the relationships between the variables, experts for the petitioner explained that multicollinearity tends to dampen the racial effect rather than enhance it.[23]

The district court did not fail in every instance to analyze the significance of the problems. Yet when it did reach this issue, the court at times appeared to misunderstand the nature of this study or of regression analysis generally. In several related criticisms, it found that any of the models accounting for less than 230 independent variables were completely worthless (580 F.Supp. at 361), that the most complete models were unable to capture every nuance of every case (580 F.Supp. at 356, 371), and that the models were not sufficiently predictive to be relied upon in light of their low R^2 value (580 F.Supp. at 361).[24] The majority implicitly questions the validity of the Baldus Study on several occasions when it adopts the first two of these criticisms.[25] A proper understanding of statistical methods shows, however, that these are not serious shortcomings in the Baldus Study.

The district court mistrusted smaller models because it placed too much weight on one of the several complementary goals of statistical analysis. Dr. Baldus testified that in his opinion the 39-variable model was the best among the many models he produced. The district court assumed somewhat mechanistically that the more independent variables encompassed by a model, the better able it was to estimate the proper influence of non-racial factors. But in statistical models, bigger is not always better. After a certain point, additional independent variables become correlated with variables already being considered and distort or suppress their influence. The most accurate models strike an appropriate balance between the risk of omitting a significant factor and the risk of multicollinearity. Hence, the district court erred in rejecting all but the largest models.

The other two criticisms mentioned earlier spring from a single source—the misinterpretation of the R^2 measurement.[26] The failure of the models to capture every nuance of every case was an inevitable but harmless failure. Regression analysis accounts for this limitation with an R^2 measurement. As a result, it does not matter

fied that the National Academy of Sciences had considered this same issue and had recommended the course taken by Dr. Baldus. Dr. Katz, the expert witness for the state, suggested removing the cases with the U codes from the study altogether. The district court's suggestion, then, that the U codes be treated as present, appears to be groundless and clearly erroneous.

Baldus later demonstrated that the U codes did not affect the race-of-the-victim factor by recoding all the items coded with a U and treating them as present. Each of the tests showed no significant reduction in the racial variable. The district court rejected this demonstration because it was not carried out using the largest available model.

23. The district court rejected this expert testimony, not because of any rebuttal testimony, but because it allegedly conflicted with the petitioner's other theory that multicollinearity affects statistical significance. 580 F.Supp. at 364. The two theories are not inconsistent, for neither Dr. Baldus nor Dr. Woodworth denied that multicollinearity might have multiple effects. The two theories each analyze one possible effect. Therefore, the district court rejected this testimony on improper grounds.

24. The R^2 measurement represents the influence of random factors unique to each case that could not be captured by addition of another independent variable. As R^2 approaches a value of 1.0, one can be more sure that the independent variables already identified are accurate and that no significant influences are masquerading as random influences.

25. *See, e.g.*, pp. 896, 899.

26. *See* footnote 24.

that a study fails to consider every nuance of every case because random factors (factors that influence the outcome in a sporadic and unsystematic way) do not impugn the reliability of the systemwide factors already identified, including race of the victim. Failure to consider extra factors becomes a problem only where they operate throughout the system, that is, where R^2 is inappropriately low.

The district court did find that the R^2 of the 230-variable study, which was nearly .48, was too low.[27] But an R^2 of that size is not inappropriately low in every context.[28] The R^2 measures random factors unique to each case: in areas where such factors are especially likely to occur, one would expect a low R^2. As the experts, the district court and the majority have pointed out, no two death penalty cases can be said to be exactly alike, and it is especially unlikely for a statistical study to capture every influence on a sentence. In light of the random factors at work in the death penalty context, the district court erred in finding the R^2 of all the Baldus Study models too low.[29]

Errors of this sort appear elsewhere in the district court opinion and leave me with the definite and firm conviction that the basis for the district court's ruling on the invalidity of the study was clearly erroneous. *United States v. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948). This statistical analysis, while imperfect, is sufficiently complete and reliable to serve as competent evidence to guide the court. Accordingly, I would reverse the judgment of the district court with regard to the validity of the Baldus Study. I would also reverse that court's determination that an Eighth Amendment claim is not available to the petitioner. He is entitled to relief on this claim.

IV. OTHER ISSUES

I concur in the opinion of the court with regard to the death-oriented jury claim and in the result reached by the court on the ineffective assistance of counsel claim. I must dissent, however, on the two remaining issues in the case. I disagree with the holding on the *Giglio* issue, on the basis of the findings and conclusions of the district court and the dissenting opinion of Chief Judge Godbold. As for the *Sandstrom* claim, I would hold that the instruction was erroneous and that the error was not harmless.

It is by no means certain that an error of this sort can be harmless. *See Connecticut v. Johnson*, 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983). Even if an error could be harmless, the fact that McCleskey relied on an alibi defense does not mean that intent was "not at issue" in the case. Any element of a crime can be at issue whether or not the defendant presents evidence that disputes the prosecution's case on that point. The jury could find that the prosecution had failed to dispel all reasonable doubts with regard to intent even though the defendant did not specifically make such an argument. Intent is at issue wherever there is evidence to support a reasonable doubt in the mind of a reasonable juror as to the existence of criminal intent. *See Lamb v. Jernigan*, 683 F.2d

27. It based that finding on the fact that a model with an R^2 less than .5 "does not predict the outcome in half of the cases." This is an inaccurate statement, for an R^2 actually represents the percentage of the original 11-to-1 differential explained by all the independent variables combined. A model with an R^2 of less than .5 would not necessarily fail to predict the outcome in half the cases because the model improves upon pure chance as a way of correctly predicting an outcome. For dichotomous outcomes (i.e. the death penalty is imposed or it is not), random predictions could succeed half the time.

28. *Wilkins v. University of Houston*, 654 F.2d 388, 405 (5th Cir.1981), is not to the contrary. That court stated only that it could not know whether an R^2 of .32 or .33 percent would be inappropriately low in that context since the parties had not made any argument on the issue.

29. Furthermore, an expert for the petitioner offered the unchallenged opinion that the R^2 measurements in studies of dichotomous outcomes are understated by as much as 50%, placing the R - values of the Baldus Study models somewhere between .7 and .9.

1332, 1342–43 (11th Cir.1982) ("no reasonable juror could have determined ... that appellant acted out of provocation or self-defense," therefore error was harmless).

The majority states that the raising of an alibi defense does not automatically render a *Sandstrom* violation harmless. It concludes, however, that the raising of a non-participation defense coupled with "overwhelming evidence of an intentional killing" will lead to a finding of harmless error. The majority's position is indistinguishable from a finding of harmless error based solely on overwhelming evidence.[30] Since a defendant normally may not relieve the jury of its responsibility to make factual findings regarding every element of an offense, the only way for intent to be "not at issue" in a murder trial is if the evidence presented by either side provides no possible issue of fact with regard to intent. Thus, McCleskey's chosen defense in this case should not obscure the sole basis for the disagreement between the majority and myself: the reasonable inferences that could be drawn from the circumstances of the killing. I cannot agree with the majority that no juror, based on any reasonable interpretation of the facts, could have had a reasonable doubt regarding intent.

Several factors in this case bear on the issue of intent. The shooting did not occur at point-blank range. Furthermore, the officer was moving at the time of the shooting. On the basis of these facts and other circumstances of the shooting, a juror could have had a reasonable doubt as to whether the person firing the weapon intended to kill. While the majority dismisses this possibility as "mere speculation," the law requires an appellate court to speculate about what a reasonable juror *could* have concluded. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), *aff'd on other grounds*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983). Therefore, the judgment of the district court should be reversed on this ground, as well.

HATCHETT, Circuit Judge, dissenting in part, and concurring in part:[1]

In this case, the Georgia system of imposing the death penalty is shown to be unconstitutional. Although the Georgia death penalty statutory scheme was held constitutional "on its face" in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), application of the scheme produces death sentences explainable only on the basis of the race of the defendant and the race of the victim.

I write to state clearly and simply, without the jargon of the statisticians, the results produced by the application of the Georgia statutory death penalty scheme, as shown by the Baldus Study.

The Baldus Study is valid. The study was designed to answer the questions when, if ever, and how much, if at all, race is a factor in the decision to impose the death penalty in Georgia. The study gives the answers: In Georgia, when the defendant is black and the victim of murder is white, a 6 percent greater chance exists that the defendant will receive the death penalty solely because the victim is white. This 6 percent disparity is present throughout the total range of death-sentenced black defendants in Georgia. While the 6 percent is troublesome, it is the disparity in the mid-range on which I focus. When

30. Indeed, the entire harmless error analysis employed by the court may be based on a false dichotomy between "overwhelming evidence" and elements "not at issue." Wherever intent is an element of a crime, it can only be removed as an issue by overwhelming evidence. The observation by the plurality in *Connecticut v. Johnson*, *supra*, that a defendant may in some cases "admit" an issue, should only apply where the evidence allows only one conclusion. To allow an admission to take place in the face of evidence to the contrary improperly infringes on the jury's duty to consider all relevant evidence.

1. Although I concur with the majority opinion on the ineffective assistance of counsel and death-oriented jury issues, I write separately to express my thoughts on the Baldus Study.

I also join Chief Judge Godbold's dissent as to the *Caplin* issue and Judge Johnson's dissent.

cases are considered which fall in the mid-range, between less serious and very serious aggravating circumstances, where the victim is white, the black defendant has a 20 percent greater chance of receiving the death penalty because the victim is white, rather than black. This is intolerable; it is in this middle range of cases that the decision on the proper sentence is most difficult and imposition of the death penalty most questionable.

The disparity shown by the study arises from a variety of statistical analyses made by Dr. Baldus and his colleagues. First, Baldus tried to determine the effect of race of the victim in 594 cases (PRS study) comprising all persons convicted of murder during a particular period. To obtain better results, consistent with techniques approved by the National Academy of Sciences, Baldus identified 2,500 cases in which persons were indicted for murder during a particular period and studied closely 1,066 of those cases. He identified 500 factors, bits of information, about the defendant, the crime, and other circumstances surrounding each case which he thought had some impact on a death sentence determination. Additionally, he focused on 230 of these factors which he thought most reflected the relevant considerations in a death penalty decision. Through this 230-factor model, the study proved that black defendants indicted and convicted for murder of a white victim begin the penalty stage of trial with a significantly greater probability of receiving the death penalty, solely because the victim is white.

Baldus also observed thirty-nine factors, including information on aggravating circumstances, which match the circumstances in this case. This focused study of the aggravating circumstances in the mid-range of severity indicated that "white victim crimes were shown to be 20 percent more likely to result in a death penalty sentence than equally aggravated black victim crimes." Majority at 896.

We must not lose sight of the fact that the 39-factor model considers information relevant to the impact of the decisions being made by law enforcement officers, prosecutors, judges, and juries in the decision to impose the death penalty. The majority suggests that if such a disparity resulted from an identifiable actor or agency in the prosecution and sentencing process, the present 20 percent racial disparity could be great enough to declare the Georgia system unconstitutional under the eighth amendment. Because this disparity is not considered great enough to satisfy the majority, or because no identification of an actor or agency can be made with precision, the majority holds that the statutory scheme is approved by the Constitution. Identified or unidentified, the result of the unconstitutional ingredient of race, at a significant level in the system, is the same on the black defendant. The inability to identify the actor or agency has little to do with the constitutionality of the system.

The 20 percent greater chance in the mid-range cases (because the defendant is black and the victim is white) produces a disparity that is too high. The study demonstrates that the 20 percent disparity, in the real world, means that one-third of the black defendants (with white victims) in the mid-range cases will be affected by the race factor in receiving the death penalty. Race should not be allowed to take a significant role in the decision to impose the death penalty.

The Supreme Court has reminded us on more than one occasion that "if a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980). A statute that intentionally or unintentionally allows for such racial effects is unconstitutional under the eighth amendment. Because the majority holds otherwise, I dissent.[2]

2. Nothing in the majority opinion regarding the validity, impact, or constitutional significance of studies on discrimination in application of the Florida death penalty scheme should be

CLARK, Circuit Judge, dissenting in part and concurring in part *:

We are challenged to determine how much racial discrimination, if any, is tolerable in the imposition of the death penalty. Although I also join in Judge Johnson's dissent, this dissent is directed to the majority's erroneous conclusion that the evidence in this case does not establish a prima facie Fourteenth Amendment violation.

The Study

The Baldus study, which covers the period 1974 to 1979, is a detailed study of over 2,400 homicide cases. From these homicides, 128 persons received the death penalty. Two types of racial disparity are established—one based on the race of the victim and one based on the race of the defendant. If the victim is white, a defendant is more likely to receive the death penalty. If the defendant is black, he is more likely to receive the death penalty. One can only conclude that in the operation of this system the life of a white is dearer, the life of a black cheaper.

Before looking at a few of the figures, a perspective is necessary. Race is a factor in the system only where there is room for discretion, that is, where the decision maker has a viable choice. In the large number of cases, race has no effect. These are cases where the facts are so mitigated the death penalty is not even considered as a possible punishment. At the other end of the spectrum are the tremendously aggravated murder cases where the defendant will very probably receive the death penalty, regardless of his race or the race of the victim. In between is the mid-range of cases where there is an approximately 20% racial disparity.

The Baldus study was designed to determine whether like situated cases are treated similarly. As a starting point, an unanalyzed arithmetic comparison of all of the cases reflected the following:

Death Sentencing Rates by Defendant/Victim Racial Combination [1]

A	B	C	D
Black Defendant/ White Victim	White Defendant/ White Victim	Black Defendant/ Black Victim	White Defendant/ Black Victim
.22 (50/228)	.08 (58/745)	.01 (18/1438)	.03 (2/64)
.11 (108/973)		.013 (20/1502)	

These figures show a gross disparate racial impact—that where the victim was white there were 11% death sentences, compared to only 1.3 percent death sentences when the victim was black. Similarly, only 8% of white defendants compared to 22% of black defendants received the death penalty when the victim was white. The Supreme

construed to imply that the United States Supreme Court has squarely passed on the Florida studies. Neither the Supreme Court nor the Eleventh Circuit has passed on the Florida studies, on a fully developed record (as in this case), under fourteenth and eighth amendment challenges.

* Although I concur with the majority opinion on the ineffective assistance of counsel and death oriented jury issues, I write separately to express my thoughts on the Baldus Study. I also join Chief Judge Godbold's dissent and Judge Johnson's dissent.

1. DB Exhibit 63

Court has found similar gross disparities to be sufficient proof of discrimination to support a Fourteenth Amendment violation.[2]

The Baldus study undertook to determine if this racial sentencing disparity was caused by considerations of race or because of other factors or both. In order to find out, it was necessary to analyze and compare each of the potential death penalty cases and ascertain what relevant factors were available for consideration by the decision makers.[3] There were many factors such as prior capital record, contemporaneous offense, motive, killing to avoid arrest or for hire, as well as race. The study showed that race had as much or more impact than any other single factor. *See* Exhibits DB 76–78, T-776–87. Stated another way, race influences the verdict just as much as any one of the aggravating circumstances listed in Georgia's death penalty statute.[4] Therefore, in the application of the statute in Georgia, race of the defendant and of the victim, when it is black/white, functions as if it were an aggravating circumstance in a discernible number of cases. *See Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 2747, 77 L.Ed.2d 235 (1983) (race as an aggravating circumstance would be constitutionally impermissible).

Another part of the study compared the disparities in death penalty sentencing according to race of the defendant and race of the victim and reflected the differences in the sentencing depending upon the predicted chance of death, i.e., whether the type of case was or was not one where the death penalty would be given.

2. *See* discussion below at Page 9.

3. An individualized method of sentencing makes it possible to differentiate each particular case "in an objective, evenhanded, and substantially rational way from the many Georgia murder cases in which the death penalty may not be imposed." *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235, 251.

4. O.C.G.A. § 17-10-30.

Table 43

RACE OF DEFENDANT DISPARITIES IN DEATH SENTENCING RATES CONTROLLING FOR THE PREDICTED LIKELIHOOD OF A DEATH SENTENCE AND THE RACE OF THE VICTIM

A. Predicted Chance of a Death Sentence (based on 8 Variables)	B. Average Actual Sentencing Rate for the Cases at Each Level	C. Death Sentencing Rates for White Victim Cases Involving: Black Defendants	D. White Defendants	E. Arithmetic Difference in Rate of the Defendant Rates (C-D)	F. Ratio of Race of the Defendant Rates (C/D)	G. Death Sentencing Rates for Black Victim Cases Involving: Black Defendants	H. White Defendants	I. Arithmetic Difference in Rate of the Defendant Rates (G-H)	J. Ratio of Race of the Defendant Rates (G/H)
1	0 (0/126)	0 (0/74)	0 (0/52)	0		0 (0/126)			
2	0 (0/56)	0 (0/34)	0 (0/22)	0		0 (0/25)	0 (0/31)	0	0
3	0 (0/33)	0 (0/18)	0 (1/15)	0		11 (2/18)	0 (0/15)	11	0
4	0 (0/21)	23 (3/13)	0 (0/8)	23	0	0 (0/13)			
5	27 (3/11)	25 (2/8)	0 (0/3)	25	0	17 (2/12)			
6	0 (0/8)	0 (0/4)	0 (0/4)	0		0 (0/5)	0 (0/3)	0	0
7	43 (3/7)	50 (2/4)	0 (0/3)	50	0	50 (1/2)	0 (0/2)	50	0
8	75 (3/4)	67 (2/3)	0 (0/1)	67	0	0 (0/1)			

Columns A and B reflect the step progression of least aggravated to most aggravated cases. Table 43, DB. Ex. 91.[5] Columns C and D compare sentencing rates

5. The eight sub-groups were derived from the group of cases where the death penalty was predictably most likely based upon an analysis of the relevant factors that resulted in the vast majority of defendants receiving the death penalty—116 out of the total 128. This group was then sub-divided into the eight sub-groups in ascending order giving consideration to more serious aggravating factors and larger combinations of them as the steps progress. Tr. pages [illegible]

of black defendants to white defendants when the victim is white and reflect that in Steps 1 and 2 no death penalty was given in those 41 cases. In Step 8, 45 death penalties were given in 50 cases, only two blacks and three whites escaping the death penalty—this group obviously representing the most aggravated cases. By comparing Steps 3 through 7, one can see that in each group black defendants received death penalties disproportionately to white defendants by differences of .27, .19, .15, .22, and .25. This indicates that unless the murder is so vile as to almost certainly evoke the death penalty (Step 8), blacks are approximately 20% more likely to get the death penalty.

The right side of the chart reflects how unlikely it is that any defendant, but more particularly white defendants, will receive the death penalty when the victim is black.

Statistics as Proof

The jury selection cases have utilized different methods of statistical analysis in determining whether a disparity is sufficient to establish a prima facie case of purposeful discrimination.[6] Early jury selection cases, such as *Swain v. Alabama*, used very simple equations which primarily analyzed the difference of minorities eligible for jury duty from the actual number of minorities who served on the jury to determine if a disparity amounted to a substantial underrepresentation of minority jurors.[7] Because this simple method did not consider many variables in its equation, it was not as accurate as the complex statistical equations widely used today.[8]

The mathematical disparities that have been accepted by the Court as adequate to establish a prima facie case of purposeful discrimination range approximately from 14% to 40%.[9] "Whether or not greater disparities constitute prima facie evidence of discrimination depends upon the facts of each case." [10]

Statistical disparities in jury selection cases are not sufficiently comparable to provide a complete analogy. There are no guidelines in decided cases so in this case we have to rely on reason. We start with a sentencing procedure that has been approved by the Supreme Court.[11] The object of this system, as well as any constitutionally permissible capital sentencing system, is to provide individualized treatment of those eligible for the death penalty to insure that non-relevant factors, *i.e.* factors that do not relate to this particular individual or the crime committed, play no part in deciding who does and who does not receive the death penalty.[12] The facts dis-

6. In *Villafane v. Manson*, 504 F.Supp. 78 (D.Conn.1980), the court noted that four forms of analysis have been used: (1) the absolute difference test used in *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965); (2) the ratio approach; (3) a test that moves away from the examination of percentages and focuses on the differences caused by underrepresentation in each jury; and (4) the statistical decision theory which was fully embraced in *Castaneda v. Partida*, 430 U.S. at 496 n. 17, 97 S.Ct. at 1281 n. 17. *See also* Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv.L.Rev. 338 (1966).

7. *See Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965); *Villafane v. Manson*, 504 F.Supp. at 83.

8. *See* Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv.L.Rev. 338, 363 (1966) ("The Court did not reach these problems in *Swain* because of its inability to assess the significance of statistical data without mathematical tools.").

9. *Castaneda v. Partida*, 430 U.S. at 495–96, 97 S.Ct. at 1280–82 (disparity of 40%); *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970) (disparity of 23%); *Whitus v. Georgia*, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967) (disparity of 18%); *Sims v. Georgia*, 389 U.S. 404, 88 S.Ct. 523, 19 L.Ed.2d 634 (1967) (disparity of 19.7%); *Jones v. Georgia*, 389 U.S. 24, 88 S.Ct. 4, 19 L.Ed.2d 25 (1967) (disparity of 14.7%). These figures result from the computation used in *Swain*.

10. *United States ex rel Barksdale v. Blackburn*, 639 F.2d 1115, 1122 (5th Cir.1981) (en banc).

11. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

12. The sentencing body's decision must be focused on the "particularized nature of the crime and the particularized characteristics of the in-

closed by the Baldus study, some of which have been previously discussed, demonstrate that there is sufficient disparate treatment of blacks to establish a prima facie case of discrimination.

This discrimination, when coupled with the historical facts, demonstrate a prima facie Fourteenth Amendment violation of the Equal Protection Clause. It is that discrimination against which the Equal Protection Clause stands to protect. The majority, however, fails to give full reach to our Constitution. While one has to acknowledge the existence of prejudice in our society, one cannot and does not accept its application in certain contexts. This is nowhere more true than in the administration of criminal justice in capital cases.

The Fourteenth Amendment and Equal Protection

"A showing of intent has long been required in *all* types of equal protection cases charging racial discrimination." [13] The Court has required proof of intent before it will strictly scrutinize the actions of a legislature or any official entity.[14] In this respect, the intent rule is a tool of self-restraint that serves the purpose of limiting judicial review and policymaking.[15]

The intent test is not a monolithic structure. As with all legal tests, its focus will vary with the legal context in which it is applied. Because of the variety of situations in which discrimination can occur, the method of proving intent is the critical focus. The majority, by failing to recognize this, misconceives the meaning of intent in the context of equal protection jurisprudence.

Intent may be proven circumstantially by utilizing a variety of objective factors and can be inferred from the totality of the relevant facts.[16] The factors most appropriate in this case are: (1) the presence of historical discrimination; and (2) the impact, as shown by the Baldus study, that the capital sentencing law has on a suspect class.[17] The Supreme Court has indicated that:

> Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly . . . where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo.[18]

Evidence of disparate impact may demonstrate that an unconstitutional purpose

dividual defendant." 428 U.S. at 206, 96 S.Ct. at 2940. *See also Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) ("the need for treating each defendant in a capital case with degree of respect due the uniqueness of the individual is far more important than in non-capital cases." 438 U.S. at 605, 98 S.Ct. at 2965); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 does focus on a characteristic of the particular defendant, albeit an impermissible one. *See infra*, p. 3.

13. *Rogers v. Lodge*, 458 U.S. 613, 102 S.Ct. 3272, 3276, 73 L.Ed.2d 1012 (1982).

14. *Id.* at n. 5 ("Purposeful racial discrimination invokes the strictest scrutiny of adverse differential treatment. Absent such purpose, differential impact is subject only to the test of rationality."); *see also* Sellers, *The Impact of Intent on Equal Protection Jurisprudence*, 84 Dick.L.Rev. 363, 377 (1979) ("the rule of intent profoundly affects the Supreme Court's posture toward equal protection claims.").

15. The intent rule "serves a countervailing concern of limiting judicial policy making. Washington v. Davis can be understood . . . as a reflection of the Court's own sense of institutional self-restraint—a limitation on the power of judicial review that avoids having the Court sit as a super legislature." Note, *Section 1981: Discrimination Purpose or Disproportionate Impact*, 80 Colum.L.R. 137, 160-61 (1980); *see also Washington v. Davis*, 426 U.S. 229, 247-48, 84 S.Ct. 2040, 2051, 48 L.Ed.2d 597 (1976).

16. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977).

17. *Id. See also Rogers v. Lodge*, 102 S.Ct. at 3280.

18. *Rogers v. Lodge*, 102 S.Ct. at 3280.

may continue to be at work, especially where the discrimination is not explainable on non-racial grounds.[19] Table 43, *supra* p. 4, the table and the accompanying evidence leave unexplained the 20% racial disparity where the defendant is black and the victim is white and the murders occurred under very similar circumstances.

Although the Court has rarely found the existence of intent where disproportionate impact is the *only* proof, it has, for example, relaxed the standard of proof in jury selection cases because of the "nature" of the task involved in the selection of jurors.[20] Thus, to show an equal protection violation in the jury selection cases, a defendant must prove that "the procedure employed resulted in a substantial underrepresentation of his race or of the identifiable group to which he belongs."[21] The idea behind this method is simple. As the Court pointed out, "[i]f a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process."[22] Once there is a showing of a substantial underrepresentation of the defendant's group, a prima facie case of discriminatory intent or purpose is established and the state acquires the burden of rebutting the case.[23]

In many respects the imposition of the death penalty is similar to the selection of jurors in that both processes are discretionary in nature, vulnerable to the bias of the decision maker, and susceptible to a rigorous statistical analysis.[24]

The Court has refrained from relaxing the standard of proof where the case does not involve the selection of jurors because of its policy of: (1) deferring to the reasonable acts of administrators and executives; and (2) preventing the questioning of tax, welfare, public service, regulatory, and licensing statutes where disparate impact is the only proof.[25] However, utilizing the standards of proof in the jury selection cases to establish intent in this case will not contravene this policy because: (1) deference is not warranted where the penalty is grave and less severe alternatives are available; and (2) the court did not contemplate capital sentencing statutes when it established this policy. Thus, statistics alone could be utilized to prove intent in this case. But historical background is

19. In *Washington v. Davis*, 426 U.S. at 242, 96 S.Ct. at 2049, the Court stated: "It is also not infrequently true that the discriminatory impact ... may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." *See also Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 2296 n. 24, 60 L.Ed.2d 870 (1979) (*Washington* and *Arlington* recognize that when a neutral law has a disparate impact upon a group that has historically been a victim of discrimination, an unconstitutional purpose may still be at work).

20. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. at 267 n. 13, 97 S.Ct. at 564 n. 13 ("Because of the nature of the jury-selection task, however, we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of *Yick Wo* [118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220] or *Gomillion* [364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110]"); *see also International Bro. of Teamsters v. United States*, 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977) ("We have repeatedly approved the use of statistical proof ... to establish a prima facie case of racial discrimination in jury selection cases.").

21. *Castaneda v. Partida*, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977).

22. *Id.* at n. 13.

23. *Id.* at 495, 97 S.Ct. at 1280.

24. *Proper Legal Theories for Attacking Racial Disparity in Sentencing*, 18 Crim.L.Rep. 101, 110-11 (1982) ("In many respects sentencing is similar to the selections of jury panels as in *Castaneda*."). The majority opinion notes that the Baldus study ignores quantitative difference in cases: "looks, age, personality, education, profession, job, clothes, demeanor, and remorse ..." Majority opinion at 62. However, it is these differences that often are used to mask, either intentionally or unintentionally, racial prejudice.

25. *See Washington v. Davis*, 426 U.S. at 248, 96 S.Ct. at 2051; *Note, Section 1981: Discriminatory Purpose or Disproportionate Impact*, 80 Colum.L.R. 137, 146-47 (1980).

also relevant and supports the statistical conclusions.

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of Justice."[28] It is the duty of the courts to see to it that throughout the procedure for bringing a person to justice, he shall enjoy "the protection which the Constitution guarantees."[27] In an imperfect society, one has to admit that it is impossible to guarantee that the administrators of justice, both judges and jurors, will successfully wear racial blinders in every case.[28] However, the risk of prejudice must be minimized and where clearly present eradicated.

Discrimination against minorities in the criminal justice system is well documented.[29] This is not to say that progress has not been made, but as the Supreme Court in 1979 acknowledged,

> we also cannot deny that, 114 years after the close of the War between the States and nearly 100 years after *Strauder* [100 U.S. 303, 25 L.Ed. 664] racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is no less real or pernicious.[30]

If discrimination is especially pernicious in the administration of justice, it is nowhere more sinister and abhorrent than when it plays a part in the decision to impose society's ultimate sanction, the penalty of death.[31] It is also a tragic fact that this discrimination is very much a part of the country's experience with the death penalty.[32] Again and as the majority

26. *Rose v. Mitchell*, 443 U.S. 545, 556, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979).

27. *Rose, supra*, 443 U.S. at 557, 99 S.Ct. at 3000.

28. As Robespierre contended almost 200 years ago:

> Even if you imagine the most perfect judicial system, even if you find the most upright and the most enlightened judges, you will still have to allow place for error or prejudice. *Robespierre* (G. Rude ed. 1967).

29. *See, e.g., Johnson v. Virginia*, 373 U.S. 61, 83 S.Ct. 1053, 10 L.Ed.2d 195 (1963) (invalidating segregated seating in courtrooms); *Hamilton v. Alabama*, 376 U.S. 650, 84 S.Ct. 982, 11 L.Ed.2d 979 (1964) (conviction reversed when black defendant was racially demeaned on cross-examination); *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969) (mass fingerprinting of young blacks in search of rape suspect overturned). *See also Rose v. Mitchell, supra* (racial discrimination in grand jury selection); *Rogers v. Britton*, 476 F.Supp. 1036 (E.D. Ark.1979). A very recent and poignant example of racial discrimination in the criminal justice system can be found in the case of *Bailey v. Vining*, unpublished order, civ. act. no. 76-199 (M.D.Ga.1978). In *Bailey*, the court declared the jury selection system in Putnam County, Georgia to be unconstitutional. The Office of the Solicitor sent the jury commissioners a memo demonstrating how they could underrepresent blacks and women in traverse and grand juries but avoid a prima facie case of discrimination because the percentage disparity would still be within the parameters of Supreme Court and Fifth Circuit case law. *See* notes 7-8 *supra* and relevant text. The result was that a limited number of blacks were handpicked by the jury commissioners for service.

30. *Rose, supra*, 443 U.S. at 558-59, 99 S.Ct. at 3001.

31. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (*see especially* the opinions of Douglas, J., concurring, *id.* at 249-252, 92 S.Ct. at 2731-2733; Stewart, J., concurring, *id.* at 309-310, 92 S.Ct. at 2762; Marshall, J., concurring, *id.* at 364-365, 92 S.Ct. at 2790; Burger, C.J., dissenting, *id.* at 389-390 n. 12, 92 S.Ct. at 2803-2804 n. 12; Powell, J., dissenting, *id.* at 449, 92 S.Ct. at 2833).

32. This historical discrimination in the death penalty was pointed out by Justice Marshall in his concurring opinion in *Furman, supra*, 408 U.S. at 364-65, 92 S.Ct. at 2790. "[i]ndeed a look at the bare statistics regarding executions is enough to betray much of the discrimination." *Id. See also* footnote 32 for other opinions in *Furman* discussing racial discrimination and the death penalty. For example, between 1930 and 1980, 3,863 persons were executed in the United States. 54% of those were blacks or members of minority groups. Of the 455 men executed for rape, 89.5% were black or minorities. Sarah T. Dike, *Capital Punishment in the United States*, p. 43 (1982). Of the 2,307 people executed in the South during that time period, 1659 were black. During the same fifty-year period in Georgia, of the 366 people executed, 298 were black. Fifty-eight blacks were executed for rape as opposed to only three whites. Six blacks were executed for armed robbery while no whites were. Hugh A. Bedau, ed., *The Death Penalty in America* (3rd ed. 1982).

points out, the new post-*Furman* statutes have improved the situation but the Baldus study shows that race is still a very real factor in capital cases in Georgia. Some of this is conscious discrimination, some of it unconscious, but it is nonetheless real and it is important that we at least admit that discrimination is present.

Finally, the state of Georgia also has no compelling interest to justify a death penalty system that discriminates on the basis of race. Hypothetically, if a racial bias reflected itself randomly in 20% of the convictions, one would not abolish the criminal justice system. Ways of ridding the system of bias would be sought but absent a showing of bias in a given case, little else could be done. The societal imperative of maintaining a criminal justice system to apprehend, punish, and confine perpetrators of serious violations of the law would outweigh the mandate that race or other prejudice not infiltrate the legal process. In other words, we would have to accept that we are doing the best that can be done in a system that must be administered by people, with all their conscious and unconscious biases.

However, such reasoning cannot sensibly be invoked and bias cannot be tolerated when considering the death penalty, a punishment that is unique in its finality.[33] The evidence in this case makes a prima facie case that the death penalty in Georgia is being applied disproportionately because of race. The percentage differentials are not de minimis. To allow the death penalty under such circumstances is to approve a racial preference in the most serious decision our criminal justice system must make. This is a result our Constitution cannot tolerate.

The majority in this case does not squarely face up to this choice and its consequences. Racial prejudice/preference both conscious and unconscious is still a part of the capital decision making process in Georgia. To allow this system to stand is to concede that in a certain number of cases, the consideration of race will be a factor in the decision whether to impose the death penalty. The Equal Protection Clause of the Fourteenth Amendment does not allow this result. The decision of the district court on the Baldus issue should be reversed and the state required to submit evidence, if any is available, to disprove the prima facie case made by the plaintiff.

33. *See, e.g., Woodson v. North Carolina*, 428 U.S.

Appendix B -

Opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, in McCleskey v. Zant, 580 F.Supp. 338 (N.D. Ga. 1984)

care, is more than evident. (For an unsuccessful challenge to similar special laws dealing with provisional health needs, *see: Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 277-78 (9th Cir. 1982).

[5] Plaintiffs have chosen to rest on a roughly sketched constitutional claim based on repetitive incantations of the words "equal protection" and "due process" without making any references to any instances, aside from those justified by the special laws which were not even in effect when many of them started their dental education. They have not even made a raw challenge to the Board's application of the statutory criteria for recognizing a dental school, a relatively simple task given the accessibility of the information needed to make a comparative analysis of the courses of study and professional recognition of the institutions that they attended with comparable items in the School of Odontology of the Medical Sciences Campus of the University of Puerto Rico. The party opposing a motion for summary judgment cannot rest on the hope that the factual basis of broadly phrased pleadings will somehow emerge at trial without pointing to specific facts in the record which may still be in controversy and which are relevant to the outcome of the litigation. *See, Emery v. Merrimack Valley Woods Products, Inc.*, 701 F.2d 985, 990-93 (1st Cir.1983); *Manego v. Cape Cod Five Cents Sav. Bank*, 692 F.2d 174, 176-77 (1st Cir.1982); *Over The Road Drivers, Inc. v. Transport Insurance Co.*, 637 F.2d 816, 818 (1st Cir.1980).

[6] Plaintiffs' reference to Justice Mathew's memorable phrase in *Yick Wo v. Hopkins*, 118 U.S. 356, 373, 6 S.Ct. 1064, 1072, 30 L.Ed. 220 [2] (1886) is a typical attempt to fuel a meritless cause of action with a general principle of constitutional law. That case and this one depend upon an entirely different state of facts. There, the appellant, Yick Wo, was deprived of a means of making a living at the mere will of the board of supervisors of the city of San Francisco which refused him and 200 other Chinese subjects permission to carry on a laundry business while permitting 80 others, not Chinese subjects, to carry on the same business under similar conditions. The Court concluded that no reason existed for the discrimination "except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified." *Yick Wo* at 373, 6 S.Ct. at 1072. Here the Board's rejection of plaintiffs' petition to take the exams is based not on an application of law with an "evil eye and an unequal hand" but on their valid authority and in the exercise of their duty to comply with the legitimate interest of the Commonwealth of Puerto Rico in requiring that those that choose this jurisdiction to practice dentistry be adequately qualified.

Plaintiffs having failed to establish even the semblance of a genuine controversy on material facts, *see e.g.: Mas Marques v. Digital Equipment Co.*, 637 F.2d 24 (1st Cir.1980), the undisputed facts before the Court compel, as a matter of law, that the complaint be dismissed. Judgment shall be entered accordingly.

SO ORDERED.

Warren McCLESKEY, Petitioner,

v.

Walter D. ZANT, Respondent.

Civ. A. No. C81-2434A.

United States District Court,
N.D. Georgia,
Atlanta Division.

Feb. 1, 1984.

Habeas corpus petition was filed. The District Court, Forrester, J., held that: (1)

2. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

statistics on Georgia death penalty statute did not demonstrate prima facie case in support of contention that death penalty was imposed upon petitioner because of his race or because of race of victim; (2) jury instructions did not deprive defendant of due process; (3) claim that prosecutor failed to reveal existence of promise of assistance made to key witness entitled petitioner to relief; (4) defendant was not denied effective assistance of counsel; and (5) admission of evidence concerning prior crimes and convictions did not violate due process rights of petitioner.

Ordered accordingly.

1. **Constitutional Law** ⇐211(3)

Application of a statute, neutral on its face, unevenly applied against minorities, is a violation of equal protection clause of the Fourteenth Amendment. U.S.C.A. Const. Amend. 14.

2. **Constitutional Law** ⇐42.2(2)

Defendant sentenced to death had standing under equal protection clause to attack death penalty sentence by contending that it was imposed on him because of race of his victim. U.S.C.A. Const.Amend. 14.

3. **Constitutional Law** ⇐223

With reference to defendant's argument that he was being discriminated against on the basis of the race of his victim when death penalty was imposed, equal protection interests were not implicated in light of evidence that defendant was treated as any member of the majority. U.S.C.A. Const.Amend. 14.

4. **Criminal Law** ⇐1213.8(8)

Death penalty is not per se cruel and unusual in violation of Eighth Amendment. U.S.C.A. Const.Amend. 8.

5. **Criminal Law** ⇐1213.8(8)

Defendant sentenced to death failed to state claim that imposition of death penalty violated Eighth Amendment. U.S.C.A. Const.Amend. 8.

6. **Constitutional Law** ⇐253.2(1)

Due process of law within meaning of Fourteenth Amendment mandates that laws operate on all alike such that an individual is not subject to arbitrary exercise of governmental power. U.S.C.A. Const. Amend. 14.

7. **Evidence** ⇐150

Intentional discrimination which the law requires to prove a violation of the Fourteenth Amendment cannot be shown by statistics alone. U.S.C.A. Const.Amend. 14.

8. **Constitutional Law** ⇐253.2(1)

Disparate impact alone is insufficient to establish violation of Fourteenth Amendment unless evidence of disparate impact is so strong that only permissible inference is one of intentional discrimination. U.S.C.A. Const.Amend. 14.

9. **Evidence** ⇐150

In death penalty case, any statistical analysis used in challenging the imposition of death penalty under equal protection clause must reasonably account for racially neutral variables which could have produced effect observed. U.S.C.A. Const. Amend. 14.

10. **Evidence** ⇐150

Challenges to death penalty brought under equal protection clause requires that statistical evidence show likelihood of discriminatory treatment by decision makers who made judgments in question. U.S.C.A. Const.Amend. 14.

11. **Constitutional Law** ⇐223

In challenging imposition of death penalty on basis of racial discrimination, underlying data presented must be shown to be accurate. U.S.C.A. Const.Amend. 14.

12. **Evidence** ⇐150

In criminal prosecution in which defendant challenges imposition of death penalty on basis of racial discrimination, results of statistics should be statistically significant. U.S.C.A. Const.Amend. 14.

13. Evidence ⇐150

Generally, when accused challenges imposition of death penalty on basis of racial discrimination, statistical showing is considered significant if its "P" value is .05 or less, indicating that probability that result would have occurred by chance is one in 20 or less. U.S.C.A. Const.Amend. 14.

14. Evidence ⇐150

Before trial court will find that something is established based on multiple regression analysis, it must first be shown that model includes all of major variables likely to have an effect on dependent variable and it must be shown that unaccounted for effects are randomly distributed throughout the universe and are not correlated with independent variables included. U.S.C.A. Const.Amend. 14.

15. Evidence ⇐150

Three kinds of evidence may be introduced to validate regression model: direct evidence as to what factors are considered, what kinds of factors generally operate in decision-making process like that under challenge, and expert testimony concerning what factors can be expected to influence process under challenge. U.S.C.A. Const. Amend. 14.

16. Evidence ⇐150

In habeas corpus proceeding in which defendant challenges imposition of death penalty on basis of racial discrimination, multiple regression analysis will be rejected as a tool if it does not show effect on people similarly situated; across-the-board disparities prove nothing. U.S.C.A. Const. Amend. 14.

17. Evidence ⇐150

When imposition of death penalty is challenged on basis of racial discrimination, a regression model that ignores information central to understanding causal relationships at issue is insufficient to raise inference of discrimination. U.S.C.A. Const.Amend. 14.

18. Evidence ⇐150

When defendant challenges imposition of death penalty on basis of racial discrimination, validity of regression model depends upon showing that it predicts variations in dependent variable to some substantial degree. U.S.C.A. Const.Amend. 14.

19. Constitutional Law ⇐250.3(1)

Where gross statistical disparity can be shown, that alone may constitute prima facie case of discrimination in imposition of death penalty. U.S.C.A. Const.Amend. 14.

20. Civil Rights ⇐13.13(1)

Generally, once discrimination plaintiff has put on prima facie statistical case, burden shifts to defendant to go forward with evidence showing either existence of legitimate nondiscriminatory explanation for its actions or that plaintiff's statistical proof is unacceptable. U.S.C.A. Const.Amend. 14.

21. Evidence ⇐150

Statistics relied upon by plaintiff in discrimination case to establish prima facie case can form basis of defendant's rebuttal case, when, for example, defendant shows that numerical analysis is not the product of good statistical methodology. U.S.C.A. Const.Amend. 14.

22. Evidence ⇐150

Prima facie case of discrimination is not established until plaintiff has demonstrated both that data base is sufficiently accurate and that regression model has been properly constructed. U.S.C.A. Const.Amend. 14.

23. Evidence ⇐150

Statistics produced on weak theoretical foundation are insufficient to establish prima facie discrimination case. U.S.C.A. Const.Amend. 14.

24. Evidence ⇐150

Once prima facie discrimination case is established, burden of production is shifted to defendant and if it has not already become apparent from plaintiff's presentation, it then becomes defendant's burden to demonstrate plaintiff's statistics are misleading and such rebuttal may not be made by speculative theories. U.S.C.A. Const. Amend. 14.

25. Evidence ⇐150

Statistics on Georgia death penalty statute did not demonstrate prima facie case in support of contention that death penalty was imposed upon defendant because of his race or because of race of his victim since there was no consistent statistically significant evidence that death penalty was being imposed because defendant was black and victim was white, and even if prima facie case was made, the state rebutted statistical evidence by showing existence of another explanation for the observed result, i.e., that white victim cases were acting as proxies for aggravated cases and black victim cases were acting as proxies for mitigated cases. U.S.C.A. Const.Amend. 14.

26. Witnesses ⇐367(1)

The rule announced by the Supreme Court in *Giglio v. United States* holding that ...e jury must be apprised of any promise which induces key government witness to testify on government's behalf applies not only to traditional deals made by prosecutor in exchange for testimony but also to any promises or understandings made by any member of prosecutorial team, which includes police investigators.

27. Witnesses ⇐367(1)

A promise, made prior to witness' testimony, that investigating detective will speak favorably to federal authorities concerning pending federal charges is within scope of *Giglio v. United States* because it is sort of promise of favorable treatment which could induce witness to testify falsely on behalf of government.

28. Constitutional Law ⇐268(3)

Failure of the state to disclose understanding with one of its key witnesses regarding pending Georgia criminal charges violated defendant's due process rights; disclosure of the promise of favorable treatment and correction of other falsehoods in the witness' testimony could reasonably have affected jury verdict on charge of malice murder. U.S.C.A. Const. Amend. 14.

29. Constitutional Law ⇐266(7)

Due process clause protects accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute crime with which he is charged. U.S.C.A. Const.Amend. 14.

30. Criminal Law ⇐778(2, 5)

Jury instructions which relieve prosecution of burden of proving beyond a reasonable doubt every fact necessary to constitute crime with which defendant is charged or which shift to accused burden of persuasion on one or more elements of crime are unconstitutional. U.S.C.A. Const.Amend. 14.

31. Criminal Law ⇐778(5)

In analyzing a *Sandstrom* claim, court must first examine crime for which defendant has been convicted and then examine complained-of charge to determine whether charge unconstitutionally shifted burden of proof on any essential element of crime. U.S.C.A. Const.Amend. 14.

32. Robbery ⇐11

Offense of armed robbery under Georgia law contains elements of taking of property from person or immediate presence of person by use of offensive weapon with intent to commit theft. Ga.Code § 26-1902.

33. Homicide ⇐7

Under Georgia law, offense of murder contains essential elements of homicide, malice aforethought, and unlawfulness. O.C.G.A. § 16-5-1.

34. Homicide ⇐11

Under Georgia law, "malice" element, which distinguishes murder from lesser offense of voluntary manslaughter, means simply intent to kill in the absence of provocation. O.C.G.A. § 16-5-1.

See publication Words and Phrases for other judicial constructions and definitions.

35. Criminal Law ⇐774(6)

In Georgia murder prosecution, jury instruction stating that acts of person of sound mind and discretion are presumed to be part of person's will and person of

sound mind and discretion is presumed to intend natural and probable consequences of his act, both of which presumptions may be rebutted, taken in context of entire charge to jury, created only permissive inference that jury could find intent based upon all facts and circumstances of case, and thus, did not violate *Sandstrom*.

36. Criminal Law ⇐1172.2

Even if challenged jury instructions regarding burden of proof in murder prosecution violated *Sandstrom*, error was harmless beyond a reasonable doubt since it could not be concluded that there was any reasonable likelihood that intent instruction, even if erroneous, contributed to jury's decision to convict defendant of malice murder and armed robbery under Georgia law. Ga.Code, § 26-1902; O.C.G.A. § 16-5-1.

37. Criminal Law ⇐633(1)

References in criminal prosecution to appellate process are not per se unconstitutional unless on record as a whole it can be said that it rendered entire trial fundamentally unfair.

38. Criminal Law ⇐713, 722(7)

In Georgia murder prosecution, prosecutor's arguments did not intimate to jury that death sentence could be reviewed or set aside on appeal; rather, prosecutor's argument referred to defendant's prior criminal record and sentences he had received and such arguments were not impermissible.

39. Costs ⇐302.2(2)

Under Georgia law, appointment of expert in criminal prosecution ordinarily lies within discretion of trial court.

40. Costs ⇐302.2(2)

In Georgia murder prosecution, trial court did not abuse its discretion in denying defendant funds for additional ballistics expert since defendant had ample opportunity to examine evidence prior to trial and to subject state's expert to thorough cross-examination.

41. Criminal Law ⇐369.2(4)

In murder prosecution, evidence tending to establish that defendant had participated in earlier armed robberies employing same modus operandi and that in one of those robberies he had stolen what was alleged to have been weapon that killed police officer in instant robbery was admissible under Georgia law.

42. Criminal Law ⇐783(1)

In murder prosecution, trial court's jury instructions regarding use of evidence of prior crimes, which evidence was admissible, were not overbroad and did not deny defendant a fair trial under Georgia law.

43. Criminal Law ⇐1208.1(6)

In prosecution for armed robbery and malice murder, trial judge specifically instructed jury that it could not impose death penalty unless it found at least one statutory aggravating circumstance and that if it found one or more statutory aggravating circumstances it could also consider any other mitigating or aggravating circumstances in determining whether or not death penalty should be imposed, and thus, trial court did not err by giving jury complete and limited discretion to use any of evidence presented at trial during its deliberations regarding imposition of death penalty under Georgia law.

44. Habeas Corpus ⇐25.1(8)

In prosecution for armed robbery and malice murder, admission of evidence concerning two prior armed robberies for which defendant had been indicted and admission of details of other prior armed robberies for which he had been convicted was not so seriously prejudicial that it undermined reliability of guilt determination under Georgia law, although such evidence probably would not have been admissible in federal prosecution.

45. Habeas Corpus ⇐55.5(1)

In habeas corpus proceeding, there was no basis in record or in arguments presented by defendant for concluding that the Georgia Supreme Court was in error in finding that lineup was not impermissibly

suggestive and that in-court identifications were reliable.

46. Criminal Law ⇐412.1(1)

In Georgia prosecution for armed robbery and malice murder, trial judge did not err in finding that statement given to police officers was freely and voluntarily given; therefore, there was no error in admitting statement into evidence.

47. Jury ⇐108

In Georgia prosecution for armed robbery and malice murder, since two prospective jurors indicated they would not under any circumstances vote for death penalty, trial court committed no error in excluding them.

48. Jury ⇐33(2.1)

In Georgia prosecution for armed robbery and malice murder, exclusion of death-scrupled jurors did not violate defendant's right to be tried by jury drawn from representative cross section of community.

49. Criminal Law ⇐627.5(1)

Brady does not establish any right to pretrial discovery in a criminal case, but instead seeks only to insure fairness of defendant's trial and reliability of jury's determinations.

50. Criminal Law ⇐914

Defendant who seeks new trial under *Brady* must, to establish a successful claim, show prosecutor's suppression of evidence, favorable character of suppressed evidence for the defense, and materiality of suppressed evidence.

51. Constitutional Law ⇐268(5)

Since certain evidence was before jury in Georgia prosecution for armed robbery and malice murder, habeas court could not find that failure to disclose it prior to trial deprived defendant of due process. U.S.C.A. Const.Amend. 14.

52. Habeas Corpus ⇐55.1(1), 92(1)

In reviewing sufficiency of evidence on habeas corpus petition, district court must view evidence in a light most favorable to the state and should sustain jury verdict unless it finds that no rational trier of fact could find defendant guilty beyond a reasonable doubt.

53. Homicide ⇐253(1)

Testimonial and circumstantial evidence was sufficient to sustain conviction for malice murder under Georgia law.

54. Criminal Law ⇐641.13(4)

Criminal defendant is entitled to effective assistance of counsel, that is, counsel reasonably likely to render reasonably effective assistance. U.S.C.A. Const.Amend. 6.

55. Criminal Law ⇐641.13(1)

The constitution does not guarantee errorless counsel in criminal prosecution. U.S.C.A. Const.Amend. 6.

56. Habeas Corpus ⇐85.5(9)

In order to be entitled to habeas corpus relief on claim of ineffective assistance of counsel, petitioner must establish by a preponderance of the evidence that based upon totality of circumstances in entire record his counsel was not reasonably likely to render and in fact did not render reasonably effective assistance and that ineffectiveness of counsel resulted in actual and substantial disadvantage to course of his defense. U.S.C.A. Const.Amend. 6.

57. Habeas Corpus ⇐25.1(6)

Even if habeas corpus petitioner meets burden of establishing ineffective assistance of counsel, relief may be denied if state can prove that in context of all evidence it remains certain beyond a reasonable doubt that outcome of proceedings would not have been altered but for ineffectiveness of counsel. U.S.C.A. Const. Amend. 6.

58. Criminal Law ⇐641.13(2)

In Georgia prosecution for armed robbery and malice murder, given contradictory descriptions given by witnesses at store, inability of witness to identify defendant, defendant's repeated statement that he was not present at scene, and possible outcome of pursuing the only other defense available, trial counsel's decision to pursue

alibi defense was not unreasonable and did not constitute ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

59. Criminal Law ⇐641.13(6)

Failure of trial counsel in Georgia prosecution for armed robbery and malice murder to interview store employees was not unreasonable, trial counsel having made reasonable strategic choice to pursue alibi defense, and thus, was not ineffective assistance of counsel. U.S.C.A. Const. Amends. 6, 14.

60. Habeas Corpus ⇐25.1(6)

Habeas corpus petitioner was not entitled to relief on grounds that his counsel was ineffective because he did not disbelieve petitioner and had undertaken independent investigation.

61. Criminal Law ⇐641.13(6)

In Georgia prosecution for armed robbery and malice murder, trial counsel was not ineffective because he failed to interview state's ballistics expert where counsel had read expert's report and was prepared adequately to cross-examine expert at trial. U.S.C.A. Const.Amend. 6.

62. Criminal Law ⇐641.13(2)

Since there was nothing unconstitutional about chance viewing of defendant prior to trial, failure of trial counsel to move for continuance or mistrial on basis of suggestive lineup procedure did not constitute ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

63. Habeas Corpus ⇐85.5(11)

Assuming that failure of trial counsel to investigate prior convictions of defendant constituted ineffective assistance of counsel, petitioner could not show actual and substantial prejudice resulting from ineffectiveness warranting habeas relief. U.S.C.A. Const.Amend. 6.

64. Criminal Law ⇐641.13(2)

In Georgia prosecution for armed robbery and malice murder, trial court's instructions on presumptions of intent, other acts evidence and aggravating circumstances were not erroneous or overbroad; thus, failure of trial counsel to object to instructions did not constitute ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

65. Habeas Corpus ⇐85.5(9)

In habeas corpus proceeding record did not support finding of actual and substantial prejudice to defendant due to ineffective assistance of trial counsel at sentencing phase. U.S.C.A. Const.Amend. 6.

66. Habeas Corpus ⇐25.1(6)

There was no actual and substantial prejudice caused to habeas petitioner by trial counsel's failure to review and correct mistake in trial judge's posttrial sentencing report, even if such failure constituted ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

Robert H. Stroup, Atlanta, Ga., Jack Greenberg, John Charles Boger, New York City, Timothy K. Ford, Seattle, Wash., Anthony G. Amsterdam, N.Y. University Law School, New York City, for petitioner.

Michael J. Bowers, Atty. Gen., Mary Beth Westmoreland, Asst. Atty. Gen., Atlanta, Ga., for respondent.

ORDER OF THE COURT

FORRESTER, District Judge.

Petitioner Warren McCleskey was convicted of two counts of armed robbery and one count of malice murder in the Superior Court of Fulton County on October 12, 1978. The court sentenced McCleskey to death on the murder charge and to consecutive life sentences, to run after the death sentence, on the two armed robbery charges. On automatic appeal to the Supreme Court of Georgia the convictions and the sentences were affirmed. *McCleskey v. State*, 245 Ga. 108, 263 S.E.2d 146 (1980). The Supreme Court of the United States denied McCleskey's petition for a writ of certiorari. *McCleskey v. Georgia*, 449 U.S. 891, 101 S.Ct. 253, 66 L.Ed.2d 119 (1980). On December 19, 1980 petitioner filed an extraordinary motion for a new trial in the Superior Court of Fulton County. No hearing has ever been held on this motion.

Petitioner then filed a petition for writ of habeas corpus in the Superior Court of Butts County. After an evidentiary hearing the Superior Court denied all relief sought. *McCleskey v. Zant*, No. 4909 (Sup.Ct. of Butts County, April 8, 1981). On June 17, 1981 the Supreme Court of Georgia denied petitioner's application for a certificate of probable cause to appeal the decision of the Superior Court of Butts County. The Supreme Court of the United States denied certiorari on November 30, 1981. *McCleskey v. Zant*, 454 U.S. 1093, 102 S.Ct. 659, 70 L.Ed.2d 631 (1981).

Petitioner then filed this petition for writ of habeas corpus on December 30, 1981. He asserts 18 separate grounds for granting the writ. Some of these grounds assert alleged violations of his constitutional rights during his trial and sentencing. Others attack the constitutionality of Georgia's death penalty. Because petitioner claimed to have sophisticated statistical evidence to demonstrate that racial discrimination is a factor in Georgia's capital sentencing process, this court held an extensive evidentiary hearing to examine the merits of these claims. The court's discussion of the statistical studies and their legal significance is in Part II of this opinion. Petitioner's remaining contentions are discussed in Part. III through XVI. The court has concluded that petitioner is entitled to relief on only one of his grounds, his claim that the prosecution failed to reveal the existence of a promise of assistance made to a key witness. Petitioner's remaining contentions are without merit.

I. DETAILS OF THE OFFENSE.

On the morning of May 13, 1978 petitioner and Ben Wright, Bernard Dupree, and David Burney decided to rob a jewelry store in Marietta, Georgia. However, after Ben Wright went into the store to check it out, they decided not to rob it. The four then rode around Marietta looking for another suitable target. They eventually decided to rob the Dixie Furniture Store in Atlanta. Each of the four was armed. The evidence showed that McCleskey carried a shiny nickel-plated revolver matching the description of a .38 caliber Rossi revolver stolen in an armed robbery of a grocery store a month previously. Ben Wright carried a sawed-off shotgun, and the other two carried pistols. McCleskey went into the store to see how many people were present. He walked around the store looking at furniture and talking with one of the sales clerks who quickly concluded that he was not really interested in buying anything. After counting the people in the store, petitioner returned to the car and the four men planned the robbery. Executing the plan, petitioner entered the front of the store while the other three entered the rear by the loading dock. Petitioner secured the front of the store by rounding up the people and forcing them to lie face down on the floor. The others rounded up the employees in the rear and began to tie them up with tape. The manager was forced at gunpoint to turn over the store receipts, his watch, and $6.00. Before the robbery could be completed, Officer Frank Schlatt, answering a silent alarm, pulled his patrol car up in front of the building. He entered the front door and proceeded down the center aisle until he was almost in the middle of the store. Two shots then rang out, and Officer Schlatt collapsed, shot once in the face and once in the chest. The bullet that struck Officer Schlatt in the chest ricocheted off a pocket lighter and lodged in a nearby sofa. That bullet was recovered and subsequently determined to have been fired from a .38 caliber Rossi revolver. The head wound was fatal. The robbers all fled. Several weeks later petitioner was arrested in Cobb County in connection with another armed robbery. He was turned over to the Atlanta police and gave them a statement confessing participation in the Dixie Furniture Store robbery but denying the shooting.

Although the murder weapon was never recovered, evidence was introduced at trial that petitioner had stolen a .38 caliber Rossi in an earlier armed robbery. The State also produced evidence at trial that tended to show that the shots were fired from the front of the store and that petitioner was

the only one of the four robbers in the front of the store. The State also introduced over petitioner's objections the statements petitioner had made to Atlanta police. Finally, the State produced testimony by one of the co-defendants and by an inmate at the Fulton County Jail that petitioner had admitted shooting Officer Schlatt and had even boasted of it. In his defense petitioner offered only an unsubstantiated alibi defense.

The jury convicted petitioner of malice murder and two counts of armed robbery. Under Georgia's bifurcated capital sentencing procedure, the jury then heard arguments as to the appropriate sentence. Petitioner offered no mitigating evidence. After deliberating the jury found two statutory aggravating circumstances—that the murder had been committed during the course of another capital felony, an armed robbery; and that the murder had been committed upon a peace officer engaged in the performance of his duties. The jury sentenced the petitioner to death on the murder charge and consecutive life sentences on the armed robbery charges.

II. THE CONSTITUTIONALITY OF THE GEORGIA DEATH PENALTY

A. An Analytical Framework of the Law.

Petitioner contends that the Georgia death penalty statute is being applied arbitrarily and capriciously in violation of the Eighth and Fourteenth Amendments to the United States Constitution. He concedes at this level that the Eighth Amendment issue has been resolved adversely to him in this circuit. As a result, the petitioner wishes this court to hold that the application of a state death statute that permits the imposition of capital punishment to be based on factors of race of the defendant or race of the victim violates the equal protection clause of the Fourteenth Amendment.

[1] It is clear beyond peradventure that the application of a statute, neutral on its face, unevenly applied against minorities, is a violation of the equal protection clause of the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). The more difficult question presented is why under the facts of this case the petitioner would be denied equal protection of the law if he is sentenced to death because of the race of his victim. This quandry has led the Eighth Circuit to find that a petitioner has no standing to raise this claim as a basis for invalidating his sentence. *Britton v. Rogers*, 631 F.2d 572, 577 n. 3 (8th Cir.1980), *cert. denied*, 451 U.S. 939, 101 S.Ct. 2021, 68 L.Ed.2d 327 (1981).

While this circuit in *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978), *reh'g denied*, 441 U.S. 937, 99 S.Ct. 2064, 60 L.Ed.2d 667, *application for stay denied*, 442 U.S. 1301, 99 S.Ct. 2091, 60 L.Ed.2d 649 (1979), seemed to give lip service to this same point of view by approving the proposition that a district court "must conclude that the focus of any inquiry into the application of the death penalty must necessarily be limited to the persons who receive it rather than their victims." *Id.* at 614 n. 39, the court in *Spinkellink* also adopted the position that a petitioner such as McCleskey would have standing to sue in an equal protection context:

> Spinkellink [petitioner] has standing to raise the equal protection issue, even though he is not a member of the class allegedly discriminated against, because such discrimination, if proven, impinges on his constitutional right under the Eighth and Fourteenth Amendments not to be subjected to cruel and unusual punishment. *See Taylor v. Louisiana*, *supra*, 419 U.S. [522] at 526 [95 S.Ct. 692 at 695, 42 L.Ed.2d 690].

Id. at 612 n. 36. This footnote in *Spinkellink* warrants close examination. In *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), the Supreme Court held that a male had standing to challenge a state statute providing that a woman should not be selected for jury ser-

vice unless she had previously filed a written declaration of her desire to be subject to jury service. The Court in *Taylor* cited to *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), to conclude: "Taylor, in the case before us, was similarly entitled to tender and have adjudicated the claim that the exclusion of women from jury service deprived him of the kind of factfinder to which he was constitutionally entitled." *Id.* at 526, 95 S.Ct. at 696. In *Peters* the Supreme Court rejected the contention that because a petitioner is not black, he has not suffered any unconstitutional discrimination. The rejection of the argument, however, was based *not* on equal protection grounds, but upon due process grounds. *See* 407 U.S. at 496–97, 497 n. 5, 501, 504, 92 S.Ct. at 2165–66 n. 5 2168, 2169; *id.* at 509, 92 S.Ct. at 2171 (Burger, C.J., dissenting).

Thus, for *Spinkellink* to articulate an equal protection standing predicate based upon Sixth Amendment and due process cases can be characterized, at best, as curious. Furthermore, not only does it appear that case law in this circuit subsequent to *Spinkellink* assumes that a contention similar to that advanced by petitioner here is cognizable under equal protection, *see, e.g., Adams v. Wainwright*, 709 F.2d 1443, 1449–50 (11th Cir.), *reh'g en banc denied*, 716 F.2d 914 (11th Cir.1983); *Smith v. Balkcom*, 671 F.2d 858 (5th Cir.1982) (Unit B), but it appears that this circuit is applying equal protection standards to Eighth Amendment challenges of the death penalty. *See, e.g., Adams v. Wainwright*, *supra*. *Accord, Harris v. Pulley*, 692 F.2d 1189, 1197–98 (9th Cir.1982), *reversed and remanded on other grounds*, — U.S. —, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Indeed, in *Spinkellink* itself, the court adopted an analytical nexus between a cruel and unusual punishment contention and a Fourteenth Amendment equal protection evidentiary showing:

> [T]his is not to say that federal courts should never concern themselves on federal habeas corpus review with whether Section 921.141 [Florida's death penalty statute] is being applied in a racially discriminatory fashion. If a petitioner can show some specific act or acts evidencing intentional or purposeful racial discrimination against him, *see Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 [97 S.Ct. 555, 50 L.Ed.2d 450] (1977), either because of his own race or the race of his victim, the federal district court should intervene and review substantively the sentencing decision.

Spinkellink, 578 F.2d at 614 n. 40.

[2] Principles of *stare decisis*, of course, mandate the conclusion that petitioner has standing to bring forth his claim. Furthermore, under *stare decisis*, this court must strictly follow the strictures of *Spinkellink* and its progeny as to standards of an evidentiary showing required by this petitioner to advance successfully his claim.

[3] Were this court writing on a clean slate, it would hold that McCleskey would have standing under the due process clause of the Fourteenth Amendment, but not under the equal protection clause or the Eighth Amendment, to challenge his conviction and sentenced if he could show that they were imposed on him on account of the race of his victim. From a study of equal protection jurisprudence, it becomes apparent that the norms that underlie equal protection involve two values: (i) the right to equal treatment is inherently good, and (ii) the right to treatment as an equal is inherently good. *See* L. Tribe, *American Constitutional Law*, § 16–1, at 992–93 (1978). In this case, however, the evidence shows that the petitioner is being treated as any member of the majority would, or that petitioner's immutable characteristics have no bearing on his being treated differently from any member of the majority. Thus, with reference to his argument that he is being discriminated against on the basis of the race of his victim, equal protection interests are not being implicated.

[4, 5] Petitioner also fails to state a claim under the Eighth Amendment. It is clear from the decisions of the Supreme

Court that the death penalty is not *per se* cruel and unusual in violation of the Eighth Amendment. Prior to *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the cruel and unusual punishments clause was interpreted as applicable to contentions that a punishment involved unnecessary pain and suffering, that it was so unique as not to serve a humane purpose, or so excessive as not to serve a valid legislative purpose. *See Furman*, 408 U.S. at 330–33, 92 S.Ct. at 2772–74 (Marshall, J., concurring). In other words, Eighth Amendment jurisprudence prior to *Furman* entailed an inquiry into the nexus between the offense and punishment; that punishment which was found to be excessive was deemed to violate Eighth Amendment concerns. The Supreme Court has determined as a matter of law that where certain aggravating features are present the infliction of the death penalty is not violative of the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). In the instant case, petitioner's race of the victim argument does not address traditional Eighth Amendment concerns. His argument does not entail—nor could he seriously advance—any contention that his penalty is disproportionate to his offense, that his penalty constitutes cruel and unusual punishment, or that his penalty fails to serve any valid legislative interest.

[6] What petitioner does contend is that the Georgia system allows for an impermissible value judgment by the actors within the system—that white life is more valuable than black life—and, as a practical matter, that the Georgia system allows for a double standard for sentencing. Certainly, such allegations raise life and liberty interests of the petitioner. Furthermore, such allegations speak not to the rationality of the process but to the values inherent in the process. In other words, it is the integrity, propriety, or "fairness" of the process that is being questioned by petitioner's contention, and not the mechanics or structure of the process. Thus, petitioner's allegation of an impermissible process speaks most fundamentally to Fourteenth Amendment due process interests, rather than Eighth Amendment interests that traditionally dealt with "cruel and unusual" contexts.

> For all its consequences, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 [81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230]. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter v. Department of Social Services, 452 U.S. 18, 24–25, 101 S.Ct. 2153, 2158–2159, 68 L.Ed.2d 640 (1981). It is clear that due process of law within the meaning of the Fourteenth Amendment mandates that the laws operate on all alike such that an individual is not subject to an arbitrary exercise of governmental power. *See, e.g., Leeper v. Texas*, 139 U.S. 462, 467–68, 11 S.Ct. 577, 579–80, 35 L.Ed. 225 (1891); *Hurtado v. California*, 110 U.S. 516, 535–36, 4 S.Ct. 111, 120–21, 28 L.Ed. 232 (1884). As Justice Frankfurter observed in *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) (footnote omitted):

> Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order" to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *Malinski v. New York*, *supra* [324 U.S. 401] at 416–17 [65 S.Ct. 781 at

789, 89 L.Ed. 1029]. The standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 [54 S.Ct. 330, 332, 78 L.Ed. 674], or are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 [58 S.Ct. 149, 152, 82 L.Ed. 288].

See also Peters v. Kiff, 407 U.S. 493, 501, 92 S.Ct. 2163, 2168, 33 L.Ed.2d 83 (1972) ("A fair trial in a fair tribunal is a basic requirement of due process") (citing *In Re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955)). *See generally*, L. Tribe, *supra*, § 10-7, at 501-06.

In summary, the court concludes that the petitioner's allegation with respect to race of the victim more properly states a claim under the due process clause of the Fourteenth Amendment. The allegation is that the death penalty was imposed for a reason beyond that consented to by the governed and because of a value judgment which, though rational, is morally impermissible in our society. As such, McCleskey could fairly claim that he was being denied his life without due process of law. Although he couches his claims in terms of "arbitrary and capricious," he is, to the contrary, contending not that the death penalty was imposed in his case arbitrarily or capriciously but on account of an intentional application of an impermissible criterion. As the Supreme Court predicted in *Gregg* and as petitioner's evidence shows, the Georgia death penalty system is far from arbitrary or capricious.

This court is not, however, writing on a clean slate. Instead, it is obliged to follow the interpretations of its circuit on such claims. As noted earlier *Yick Wo* gives McCleskey standing to attack his sentence on the basis that it was imposed on him because of his race and *Spinkellink* gives him standing under the equal protection clause to attack his sentence because it was imposed because of the race of his victim. McCleskey is entitled to the grant of a writ of habeas corpus if he establishes that he was singled out for the imposition of the death penalty by some specific act or acts evidencing an intent to discriminate against him on account of his race or the race of his victim. *Smith v. Balkcom*, 660 F.2d 573 (5th Cir. Unit B 1981), *modified in part*, 671 F.2d 858 (1982); *Spinkellink*, *supra*. In *Stephens v. Kemp*, — U.S. —, 104 S.Ct. 562, 78 L.Ed.2d 370 (1983), Justice Powell, in a dissent joined in by the Chief Justice and Justices Rehnquist and O'Connor, made the following statement with reference to the Baldus study:

> Although characterized by the judges of the court of appeals who dissented from the denial of the hearing en banc as a "particularized statistical study" claimed to show "intentional race discrimination," no one has suggested that the study focused on this case. A "particularized" showing would require—as I understand it—that there was intentional race discrimination in indicting, trying and convicting Stephens and presumably in the state appellate and state collateral review that several times follows the trial.

Id. 104 S.Ct. at 564 n. 2 (Powell, J. dissenting).

[7, 8] The intentional discrimination which the law requires cannot generally be shown by statistics alone. *Spencer v. Zant*, 715 F.2d 1562, 1581 (11th Cir.1983), *reh'g en banc granted*, 715 F.2d 1583 (11th Cir.1983). Disparate impact alone is insufficient to establish a violation of the Fourteenth Amendment unless the evidence of disparate impact is so strong that the only permissible inference is one of intentional discrimination. *Sullivan v. Wainwright*, 721 F.2d 316 (11th Cir.1983); *Adams v. Wainwright*, 709 F.2d 1443 (11th Cir.1983); *Smith v. Balkcom*, 671 F.2d 858, 859 (5th Cir. Unit B), *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 149 (1982).

B. An Analytical Framework of Petitioner's Statistical Evidence.

The petitioner does rely upon statistical evidence to support his contentions respecting the operation of racial discrimination on a statewide basis. He relies on statistical and anecdotal evidence to support his contentions that racial factors play a part in the application of the death penalty in Fulton County where he was sentenced.

Statistical evidence, of course, is nothing but a form of circumstantial evidence. Furthermore, it is said "that statistics are not irrefutable, they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." *Teamsters v. United States*, 431 U.S. 324, 340, 97 S.Ct. 1843, 1857, 52 L.Ed.2d 396 (1977).

[9] As courts have dealt with statistics in greater frequency, a body of common law has developed a set of statistical conventions which must be honored before statistics will be admitted into evidence at all or before they are given much weight. These common law statistical conventions prevail even over the conventions generally accepted in the growing community of econometricians. The first convention which has universally been honored in death penalty cases is that any statistical analysis must reasonably account for racially neutral variables which could have produced the effect observed. *See Smith v. Balkcom*, *supra*; *Spinkellink v. Wainwright*, 578 F.2d 582, 612-16 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); *McCorquodale v. Balkcom*, 705 F.2d 1553, 1556 (11th Cir.1983).

[10] The second convention which applies in challenges brought under the equal protection clause is that the statistical evidence must show the likelihood of discriminatory treatment by the decision-makers who made the judgments in question. *Adams v. Wainwright*, *supra*; *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir.1968) (Blackmun, J.), *vacated on other grounds*, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970).

[11-13] The third general statistical convention is that the underlying data must be shown to be accurate. The fourth is that the results should be statistically significant. Generally, a statistical showing is considered significant if its "P" value is .05 or less, indicating that the probability that the result could have occurred by chance is 1 in 20 or less. Said another way, the observed outcome should exceed the standard error estimate by a factor of 2. *Eastland v. TVA*, 704 F.2d 613, 622 n. 12 (11th Cir.1983).

[14] McCleskey relies primarily on a statistical technique known as multiple regression analysis to produce the statistical evidence offered in support of his contentions. This technique is relatively new to the law. This court has been able to locate only six appellate decisions where a party to the litigation relied upon multiple regression analysis. In two of them, the party relying on the analysis prevailed, but in both cases their showings were supported by substantial anecdotal evidence. *E.g.*, *Wade v. Mississippi Cooperative Extension Service*, 528 F.2d 508 (5th Cir.1976). In four of them, the party relying upon the technique was found to have failed in his attempt to prove something through a reliance on it. Generally, the failure came when the party relying upon multiple regression analysis failed to honor conventions which the courts insisted upon. Before a court will find that something is established based on multiple regression analysis, it must first be shown that the model includes all of the major variables likely to have an effect on the dependent variable. Second, it must be shown that the unaccounted-for effects are randomly distributed throughout the universe and are not correlated with the independent variables included. *Eastland*, *supra*, at 704.

[15] In multiple regression analysis one builds a theoretical statistical model of reality and then attempts to control for all

possible independent variables while measuring the effect of the variable of interest upon the dependent variable. Thus, a properly done study begins with a decent theoretical idea of what variables are likely to be important. Said another way, the model must be built by someone who has some idea of how the decision-making process under challenge functions. Three kinds of evidence may be introduced to validate a regression model: (1) Direct testimony as to what factors are considered, (2) what kinds of factors generally operate in a decision-making process like that under challenge, and (3) expert testimony concerning what factors can be expected to influence the process under challenge. *Eastland, supra*, at 623 (quoting Baldus and Cole, *Statistical Proof of Discrimination*).

[16–18] Other cases have established other conventions for the use of multiple regression analysis. It will be rejected as a tool if it does not show the effect on people similarly situated; across-the-board disparities prove nothing. *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 656–58 (4th Cir.1983), *appeal pending*; *Valentino v. U.S. Postal Service*, 674 F.2d 56, 70 (D.C.Cir.1982). A regression model that ignores information central to understanding the causal relationships at issue is insufficient to raise an inference of discrimination. *Valentino, supra*, at 71. Finally, the validity of the model depends upon a showing that it predicts the variations in the dependent variable to some substantial degree. A model which explains only 32 or 53% of the variation is not very reliable. *Wilkins v. University of Houston*, 654 F.2d 388, 405 (5th Cir.1981), *cert. denied*, 459 U.S. 822, 103 S.Ct. 51, 74 L.Ed.2d 57 (1982).

[19] "To sum up, statistical evidence is circumstantial in character and its acceptability depends upon the magnitude of the disparity it reflects, the relevance of its supporting data, and other circumstances in the case supportive of or in rebuttal of a hypothesis of discrimination." *EEOC v. Federal Reserve Bank of Richmond, supra*, at 646–47. Where a gross statistical disparity can be shown, that alone may constitute a prima facie case of discrimination. This has become the analytical framework in cases brought under Title VII of the Civil Rights Act of 1964. Because Fourteenth Amendment cases have a similar framework and because there are relatively few such cases relying on statistics, when appropriate the court may draw upon Title VII cases. *Jean v. Nelson*, 711 F.2d 1455, 1486 n. 30 (11th Cir.), *reh'g en banc granted*, 714 F.2d 96 (1983).

[20–23] Generally it is said that once the plaintiff has put on a prima facie statistical case, the burden shifts to the defendant to go forward with evidence showing either the existence of a legitimate non-discriminatory explanation for its actions or that the plaintiff's statistical proof is unacceptable. *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419 (5th Cir.1980), *cert. denied*, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). The statistics relied upon by the plaintiff to establish a prima facie case can form the basis of the defendant's rebuttal case when, for example, the defendant shows that the numerical analysis is not the product of good statistical methodology. *EEOC v. Datapoint Corp.*, 570 F.2d 1264 (5th Cir.1978). Said another way, a prima facie case is not established until the plaintiff has demonstrated both that the data base is sufficiently accurate and that the regression model has been properly constructed. Otherwise, the evidence would be insufficient to survive a motion for directed verdict, and this is the *sine qua non* of a prima facie case. *Johnson, supra*, at 1487. Statistics produced on a weak theoretical foundation are insufficient to establish a prima facie case. *Eastland, supra*, at 625.

[24] Once a prima facie case is established the burden of production is shifted to the respondent. If it has not already become apparent from the plaintiff's presentation, it then becomes the defendant's burden to demonstrate that the plaintiff's statistics are misleading, and such rebuttal may not be made by speculative theories. *See Eastland, supra*, at 618. *Coser v. Hor*

Springs School District, 682 F.2d 721, 730–31 (8th Cir.1982); *Jean v. Nelson*, *supra*.

C. Findings of Fact.

The court held an evidentiary hearing for the purpose of enabling the petitioner to put on the evidence he had in support of his contention that racial factors are a consideration in the imposition of the death penalty.[1] Hereafter are the court's findings as to what was established within the context of the legal framework set out above.

1. *The Witnesses*

The principal witness called by the petitioner was Professor David C. Baldus. Professor Baldus is a 48-year-old Professor of Law at the University of Iowa. Presently he is on leave from that post and is serving on the faculty of the University of Syracuse. Baldus's principal expertise is in the use of statistical evidence in law. He and a statistician, James Cole, authored a book entitled *Statistical Proof of Discrimination* that was published by McGraw-Hill in 1980. R 54–56. He has done several pieces of social science research involving legal issues and statistical proof. R 45–46, 53.

Before he became involved in projects akin to that under analysis here, Baldus apparently had had little contact with the criminal justice system. In law school he took one course which focused heavily on the rationale of the law of homicide. R 39. During his short stint in private practice he handled some habeas corpus matters and had discussions with a friend who was an Assistant District Attorney concerning the kinds of factors which his friend utilized in deciding how to dispose of cases. R 43–44. As a part of the preparation of statistical proof of discrimination, Baldus and his co-author, Cole, re-evaluated the data set relied upon in *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir.1968), *vacated on other grounds*, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970), a rape case. R 72.

Baldus became interested in methods of proportionality review and, together with four other scholars, published findings in the Stanford Law Review and the Journal of Criminal Law and Criminology. R 89. This was done on the basis of an analysis of some capital punishment data from California. R 81, *et seq.* Thereafter Baldus became a consultant to the National Center for State Courts and to the Supreme Court of South Dakota and the Supreme Court of Delaware. It is understood that his consulting work involved proportionality review. R 95. Baldus and Cole have also prepared an article for the Yale Law Journal evaluating statistical studies of the death penalty to determine if it had a deterrent effect. R 78. At the University of Iowa Baldus taught courses on scientific evidence, discrimination law, and capital punishment.

Baldus was qualified by the court as an expert on the legal and social interpretation of data, not on the issue of whether or not the statistical procedures were valid under the circumstances. While Baldus has some familiarity with statistical methodology, he was quick to defer to statistical experts where sophisticated questions of methodology were posed. *See generally* R 109–20.

Dr. George Woodworth was called by the petitioner and qualified as an expert in the theory and application of statistics and statistical computation, especially with reference to analysis of discreet outcome data. Dr. Woodworth is an Associate Professor of Statistics at the University of Iowa and collaborated with Baldus on the preparation of the study before the court. R 1193.

The petitioner also called Dr. Richard A. Berk, a Professor of Sociology at the University of California at Santa Barbara, and he was qualified as an expert in social science research with particular emphasis on the criminal justice system. R 1749–53.

1. A separate one day hearing was had several months after the original hearing. The transcript of those proceedings appears in Volume X of the transcript, and that testimony will hereafter be referred to with the prefix "X."

The respondents called two experts. One was Dr. Joseph Katz, an Assistant Professor at Georgia State University in the Department of Quantitative Methods. He was qualified as an expert in analyzing data, in research design, in statistics, statistical analysis and quantitative methods. R 1346. Dr. Katz is a rather recent graduate of Louisiana State University. The respondent also called Roger L. Burford, a Professor of Quantitative Business Analysis at LSU. He was Katz's mentor at the graduate level. Burford was qualified as a statistical expert. R 1627–32.

The court was impressed with the learning of all of the experts. Each preferred the findings and assumptions which supported his thesis, but it seemed to the court that no one of them was willing to disregard academic honesty to the extent of advancing a proposition for which there was absolutely no support.

2. *Scope of the Studies*

Baldus and Woodworth conducted two studies on the criminal justice system in Georgia as it deals with homicide and murder cases. The first is referred to as the Procedural Reform Study. The second is referred to as the Charging and Sentencing Study. R 121–122.

The universe for the Procedural Reform Study included all persons convicted of murder at a guilt trial. Also included were several offenders who pled guilty to murder and received the death penalty. The time period for the study included offenders who were convicted under the new Georgia death penalty statute which went into effect on March 28, 1973, and included all such offenders who had been arrested as of June 30, 1978. In the Procedural Reform Study no sample of the cases was taken and instead the entire universe was studied. R 170–71. The data sources used by the researchers in the Procedural Reform Study were the files of the Georgia Supreme Court, certain information from the Department of Offender Rehabilitation, and information from the Georgia Department of Vital Statistics. R 175, *et seq.* Except for the few pleas, the Procedural Reform Study focused only on offenders who had been convicted of murder at a trial. R 122. There were approximately 550 cases in the universe for the Procedural Reform Study.

The Procedural Reform Study began when Baldus developed a questionnaire and dispatched two students to Georgia in the fall of 1979. In 1980 the coders returned to Georgia and coded 264 cases on site. R 241–43, DB 28, DB 28A. As two different questionnaires were used, the researchers wrote a computer program which translated the data gathered from both questionnaires into one format. R 246.

Baldus made some preliminary studies on the data that he gathered in the Procedural Reform Study. He found in these preliminary analyses no "race of the defendant" effect and a very unclear "race of the victim" effect. R 258. The Legal Defense Fund learned of Baldus's research and retained him to conduct the second study. R 256. Baldus was of the opinion that it was critical to the validity of the study that the strength of the evidence be measured. R 262. Also, he felt it important to examine the combined effects of all the decisions made at the different levels of the criminal justice system. R 147. Accordingly, the design of the Charging and Sentencing Study was different in that it produced measurements in these two respects in addition to measuring factors akin to those which were already being taken into account in the Procedural Reform Study.

The universe for the Charging and Sentencing Study was all offenders who were convicted of murder or voluntary manslaughter whose crimes occurred after March 28, 1973 and whose arrests occurred before December 21, 1978. This produced a universe of about 2500 defendants. R 122, 263–64. Any defendant who was acquitted or convicted of a lesser-included offense is not included in the study. R 264.

From the universe of the Charging and Sentencing Study a random stratified sample was drawn. The first stratification was

by outcome. The researchers drew a 25% random sample of murder cases with life sentences and a 25% random sample of voluntary manslaughter cases. R 1216. To this sample, all death penalty cases were added. R 267–69. The second stratification was geographic. The researchers drew a sample of 18 cases from each judicial circuit in Georgia. Where the circuit did not produce 18 cases in the first draw, additional cases were drawn from the population to supplement the original random sample. The results from each judicial circuit were then weighted so that each circuit contributed to the total effect in proportion to the total number of cases it contributed to the universe. R 270.

Because of the many factors involved in such an analysis, a simple binomial comparison would show nothing. To determine whether or not race was being considered, it is necessary to compare very similar cases. This suggests the use of a statistical technique known as cross tabulation. Because of the data available, it was impossible to get any statistically significant results in comparing exact cases using a cross tabulation method. R 705. Accordingly, the study principally relies upon multivariate analysis

3. *The Accuracy of the Data Base*

As will be noted hereafter, no statistical analysis, much less a multivariate analysis, is any better than the accuracy of the data base. That accuracy was the subject of much testimony during the hearing. To understand the issue it is necessary to examine the nature of the questionnaires utilized and the procedures employed to enter the data upon the questionnaires.

The original questionnaire for the Procedural Reform Study was approximately 120 pages long and had foils (blanks) for the entry of data on about 500 variables. DB 27. The first 14 pages of the questionnaire were filled out by the Georgia Department of Offender Rehabilitation for Professor Baldus. The remainder of the pages were coded by students in Iowa based on extracts prepared by data gatherers in Georgia.

The data on the first 15 pages of the Procedural Reform Study questionnaire includes information on sentencing, basic demographic data concerning the defendant, his physical and psychiatric condition, his IQ, his prior record, as well as information concerning his behavior as an inmate. The next six pages of the questionnaire contained inquiries concerning the method of killing. Data is also gathered on the number of victims killed, information about co-perpetrators, and the disposition of their cases, and pleadings by the defendant. Another eight pages of questions search out characteristics of the offense. Three pages are reserved for data on contemporaneous offenses, and another three pages for the victim's role in the crime and the defendant's behavior after the homicide. There are additional pages on the role of co-perpetrators. There are more questions relating to the defense at trial and on the kinds of evidence submitted by the defendant. Then, there are 26 pages of questions concerning the deliberations of the jury and information concerning the penalty trial. The questionnaire concludes on matters relating to the disposition of the case with respect to other counts charged and, finally, the last page is reserved for the coder to provide a narrative summary of what occurred in the case. R 197–200. DB 27. This questionnaire also contained foils so that the coder could indicate whether or not the prosecutor or the jury was aware of the information being coded.

It is important to reiterate that this questionnaire was not coded by students having access to the raw data in Georgia. Instead, as noted above, two law students prepared detailed abstracts of each case. Their notes were dictated and transcribed. These notes, together with an abstract filled out by an administrative aide to the Georgia Supreme Court and the opinion of the Georgia Supreme Court, were assembled as a file and were available in Iowa to the coders. R 209, 212, 241.

During the 1979–80 academic year, another questionnaire, simpler in form, was designed for use in obtaining data for the Procedural Reform Study. This questionnaire dropped the inquiries concerning whether the sentencing jury was aware of the aggravating and mitigating factors appearing in the files. R 230–31. Some of the questionnaires were coded in Georgia and some were coded in Iowa. Baldus developed a coding protocol in an effort to guide those who were entering data on the questionnaires. R 220–21, 227. The professional staff at the University of Iowa Computer Center entered the data obtained from the various Procedural Reform Study questionnaires into the computer.

Yet another questionnaire was designed for the Charging and Sentencing Study. The last questionnaire was modified in three respects. First, Baldus included additional queries concerning legitimate aggravating and mitigating factors because he had determined on the basis of his experience with earlier data that it was necessary to do so. Second, the questionnaire expanded the coverage of materials relating to prior record. Third, it contained a significant section on "strength of the evidence." R 274–77. After the new draft was produced and reviewed by several other academicians, it was reviewed by attorneys with the Legal Defense Fund. They suggested the addition of at least one other variable. R 275.

The Charging and Sentencing Study questionnaire is 42 pages long and has 595 foils for the recordation of factors which might, in Baldus's opinion, affect the outcome of the case. Generally, the kind of information sought included the location of the offense, the details of all of the charges brought against the offender, the outcome of the case, whether or not there was a plea bargain, characteristics of the defendant, prior record of the defendant, information regarding contemporaneous offenses, details concerning every victim in the case, characteristics of the offense, statutory aggravating factors, a delineation of the defendant's role vis-a-vis co-perpetrators', information on outcome of co-perpetrators' cases, other aggravating circumstances such as the number of shots fired, miscellaneous mitigating circumstances relating to the defendant or the victim, the defendant's defenses at the guilt trial, and the strength of the evidence. R 280–86. Again, all of these were categories of information which Baldus believed could affect the outcome of a given case.

A student who headed a portion of the data-gathering effort for the first study was placed in charge of five law students who were hired and trained to code the new questionnaires. R 308. This supervisor's name was Ed Gates.

The principal data source for the Charging and Sentencing study was records of the Georgia Department of Pardons and Paroles. This was supplemented with information from the Bureau of Vital Statistics and questionnaires returned from lawyers and prosecutors. Also, some information was taken from the Department of Offender Rehabilitation. R 293–94, DB 39. The records from the Department of Pardons and Paroles included a summary of the police investigative report prepared by a parole officer, an FBI rap sheet, a personal history evaluation, an admissions data summary sheet, and, on occasion, the file might contain a witness statement or the actual police report. R 347. The police report actually appeared in about 25% of the cases. R 348. The Pardons and Paroles Board investigative summaries were always done after conviction.

Baldus and Gates again developed a written protocol in an attempt to assist coders in resolving ambiguities. This protocol was developed in part on past experience and in part on a case-by-case basis. R 239–311. In the Charging and Sentencing Study the coders were given two general rules to resolve ambiguities of fact. The first rule was that the ambiguity ought to be resolved in a direction that supports the determination of the factfinder. The second rule is that when the record concerning a fact is ambiguous, the interpretation

should support the legitimacy of the sentence. R 423, EG 4.

As to each foil the coder had four choices. The response could be coded as 1, showing that the factor was definitely present, or 2, which means that the file indicated the presence of the factor. If the factor was definitely not present, the foil was left blank. In cases where it was considered equally possible for the factor to be absent or present, the coder entered the letter "U." R 517. For the purpose of making these coding decisions, it was assumed that if the file indicated that a witness who would likely have seen the information was present or if, in the case of physical evidence, it was of the type that the police would likely have been able to view, and if such information did not appear in the Parole Board summaries, then the coder treated that factor as not being present. R 521.

In addition to coding questionnaires the coders were asked to prepare brief summaries that were intended to highlight parts of the crime that were difficult to code. R 366.

By the end of the summer of 1981 the questionnaires had been coded in Georgia and they were returned to Iowa. R 565. All of the data collected had to be entered onto a magnetic tape, and this process was completed by the Laboratory for Political Research at the University of Iowa. R 595. That laboratory "cleaned" the data as it was keypunched; that is, where an impermissible code showed up in a questionnaire it was reviewed by a student coder who re-coded the questionnaire based upon a reading of Baldus's file. R 600–08.

After the data gathered for the Charging and Sentencing Study was entered on computer tapes, it was re-coded so that the data would be in a useful format for the planned analysis. The first step of the re-coding of the data was to change all 1 and 2 codes to 1, indicating that the factor was positively present. The procedure then re-coded all other responses as 0, meaning that the characteristic was not present. R 617–20.

It appears to the court that the researchers attempted to be careful in that data-gathering, but, as will be pointed out hereafter, the final data base was far from perfect. An important limitation placed on the data base was the fact that the questionnaire could not capture every nuance of every case. R 239.

Because of design of earlier questionnaires, the coders were limited to only three special precipitating events. There were other questions where there were limitations upon responses, and so the full degree of the aggravating or mitigating nature of the circumstances were not captured. In these situations where there was only a limited number of foils, the responses were coded in the order in which the student discovered them, and, as a consequence, those entered were not necessarily the most important items found with respect to the variable. R 545. The presence or absence of enumerated factors were noted without making any judgment as to whether the factor was indeed mitigating or aggravating in the context of the case. R 384.

In the Charging and Sentencing Study as well, there were instances where there was a limit on the number of applicable responses which could be entered. For example, on the variable "Method of Killing," only three foils were provided. R 461, EG 6A, p. 14. The effect of this would be to reduce the aggravation of a case that had multiple methods of inflicting death. In coding this variable the students generally would list the method that actually caused the death and would not list any other contributing assaultive behavior. R 463.

The information available to the coders from the Parole Board files was very summary in many respects. For example, on one of the completed questionnaires the coder had information that the defendant had told four other people about the murder. The coder could not, however, determine from the information in the file whether the defendant was bragging about the murder or expressing remorse. R 467–68. As the witnesses to his statements

were available to the prosecution and, presumably, to the jury, that information was knowable and probably known. It was not, however, captured in the study. The Parole Board summaries themselves were brief and the police reports from which the parole officers prepared their reports were typically only two or three pages long. R 1343.

Because of the incompleteness of the Parole Board studies, the Charging and Sentencing Study contains no information about what a prosecutor felt about the credibility of any witnesses. R 1117. It was occasionally difficult to determine whether or not a co-perpetrator testified in the case. One of the important strength of the evidence variables coded was whether or not the police report indicated clear guilt. As the police reports were missing in 75% of the cases, the coders treated the Parole Board summary as a police report. R 493–94. Then, the coders were able to obtain information based only upon their impressions of the information contained in the file. R 349.

Some of the questionnaires were clearly mis-coded. Because of the degree of latitude allowed the coders in drawing inferences based on the data of the file, a recoding of the same case by the same coder at a time subsequent might produce a different coding. R 370, 386–87. Also, there would be differences in judgment among the coders. R 387.

Several questionnaires, including the one for McCleskey and for one of his co-perpetrators, was reviewed at length during the hearing. There were inconsistencies in the way several variables were coded for McCleskey and his co-perpetrator. R 1113; Res. 1, Res. 2.

The same difficulties with accuracy and consistency of coding appeared in the Charging and Sentencing questionnaires. For example, the Charging and Sentencing Study had a question as to whether or not the defendant actively resisted or avoided arrest. McCleskey's questionnaire for the Charging and Sentencing Study indicated that he did not actively resist or avoid arrest. His questionnaire for the Procedural Reform Study indicated that he did. R 1129–30; Res. 2, Res. 4. Further, as noted above in one situation where it was undoubtedly knowable as to whether or not the defendant expressed remorse or bragged about the homicide, the factor was coded as "U." Under the protocol referred to earlier, if there was a witness present who could have known the answer and the answer did not appear in the file, then the foil is to be left blank. This indicates that the questionnaire, EG 6B, was not coded according to the protocol at foils 183 and 184.

To test the consistency of coding judgments made by the students, Katz tested the consistency of coding of the same factor in the same case as between the two studies as to 30 or so variables. There were 361 cases which appeared in both studies. Of the variables that Katz selected there were mis-matches in coding in all but two of the variables. Some of the mis-matches were significant and occurred within factors which are generally thought to be important in a determination of sentencing outcome. For example, there were mis-matches in 50% of the cases tested as to the number of death eligible factors occurring in the case. Other important factors and the percent of mis-matches are as follows:

Number of prior felonies	37
Immediate Rage Motive	15
Execution Style Murder	18
Unnecessary Killing	18
Defendant Additional Crimes	16
Bloody	28
Defendant Drug History	25
Victim Showed Fear of the Defendant	18
Two or More Victims in All	60
Victim is a Stranger	12

Respondent's Exhibit 20A, R 1440, *et seq.*

A problem alluded to above is the way the researchers chose to deal with those variables coded "U." It will be recalled that for a variable to be coded "U" in a given questionnaire, there must be sufficient circumstances in the file to suggest the possibility that it is present and to preclude the possibility that it is not

present. In the Charging and Sentencing Study there are an average of 33 variables in each questionnaire which are coded as "U." The researchers treated that information as not known to the decision-maker. R 1155. Under the protocol employed, the decision to treat the "U" factors as not being present in a given case seems highly questionable. The threshold criteria for assuming that a factor was not present were extremely low. A matter would not have been coded "U" unless there was something in the file which made the coder believe that the factor could be present. Accordingly, if the researchers wished to preserve the data and not drop the cases containing this unknown information, then it would seem that the more rational decision would be to treat the "U" factors as being present.

This coding decision pervades the data base. Well more than 100 variables had some significant number of entries coded "U." Those variables coded "U" in more than ten percent of the questionnaires are as follows (the sample size in the Charging and Sentencing Study is 1,084):

Plea Bargaining	447
Employment Status of the Defendant	207
Victim's Age	190
Occupational Status of the Victim	221
Employment Status of the Victim	244
Defendant's Motive was Long Term Hate	264
Defendant's Motive was Revenge	202
Defendant's Motive was Jealousy	180
Defendant's Motive was Immediate Rage	181
Defendant's Motive was Racial Animosity	447
Dispute While under the Influence of Alcohol or Drugs	120
Victim Mental Defective	627
Victim Pregnant	209
Victim Defenseless due to Disparity in Size or Numbers	234
Victim Support Children	741
Victim Offered No Provocation	192
Homicide Planned for More than Five Minutes	478
Execution-Style Homicide	194
Victim Pleaded for Life	709
Defendant Showed No Remorse for Homicide	190
Defendant Expressed Pleasure With Homicide	447
Defendant Created Risk of Death to Others	129
Defendant Used Alcohol or Drugs Before the Crime	251
Effect of Alcohol on the Defendant	220
Defendant Showed Remorse	913
Defendant Surrendered within 24 Hours	125
Victim Used Drugs or Alcohol Before Homicide	244
Effect of Drugs on Victim	168
Victim Aroused Defendant's Fear for Life	220
Victim Armed with Deadly Weapon	155
History of Bad Blood Between Defendant and Victim	173
Victim Accused Defendant of Misconduct	117
Victim Physically Assaulted Defendant at Homicide	159
Victim Verbally Threatened Defendant at Homicide	185
Victim Verbally Abused Defendant at Homicide	300
Victim Verbally Threatened Defendant Earlier	100
Victim Verbally Abused Defendant Earlier	156
Victim Had Bad Criminal Reputation	665
Victim had Criminal Record	946

A large number of other variables were coded "U" in more than five percent of the questionnaires. Race of the victim was unknown in 62 cases. Other variables which are often thought to explain sentencing outcomes and which were coded "U" in more than five percent of the questionnaires included:

Defendant's Motive was Sex	66
Defendant's Motive Silence Witness for Current Crime	72
Dispute with Victim Defendant over Money Property	76
Lovers Triangle	74
Victim Defenseless due to Old Age	60
Defendant Actively Resisted Arrest	67
Number of Victims Killed by the Defendant	66
Defendant Cooperated with Authorities	72
Defendant has History of Drug and Alcohol Abuse	79
Victim Physically Injured Defendant at Homicide	60
Victim Physically Assaulted Defendant Earlier	71

Many of the variables showing high rates of "U" codings were used in Baldus's models. For example, in Exhibit DB 83, models controlling for 13, 14 and 44 variables, respectively, are used in an effort to measure racial disparities. In the 13-variable model, five of the variables have substantial numbers of "U" codes. In the 14-variable mod-

el, seven variables are likewise affected, and in the 44-variable model, six were affected. Similar problems plagued the Procedural Reform Study. Respondent's Exhibits 17A, 18A; DB 96A, DB 83, R 1429.

Because of the substantial number of "U" codes in the data base and the decision to treat that factor as not present in the case, Woodworth re-coded the "U" data so that the coding would support the outcome of the case and ran a worst case analysis on five small models. This had the effect generally of depressing the coefficients of racial disparity by as much as 25%. In the three models which controlled for a relatively small number of background variables, he also re-computed the standard deviation based on his worst case analysis. In the two larger models on which he ran these studies, he did not compute the standard deviation, and in the largest model he did not even compute the racial coefficients after conducting the worst case analysis. Accordingly, it is impossible for the court to determine if the coefficient for race of the victim remains present or is statistically significant in these larger order regressions. Both because of this and because the models used in the validating procedure were not themselves validated, it cannot be said that the coding decision on the "U" data made no effect on the results obtained. See generally GW 4, Table 1.

In DB 122 and 123 Baldus conducts a worst case analysis which shows the results upon re-coding "U" data so as to legitimize the sentence. Baldus testified that the coding of unknowns would not affect the outcome of his analysis based on the experiments and these exhibits. The experiments do not, however, support his conclusion, and it would appear to the court that the experiments were not designed to support his conclusions. In DB 122 Baldus controls for only three variables; thence, it is impossible to measure the effect of any other variables or the effects that the re-coding would have on the outcome. In DB 123 he utilizes a 39-variable model and concludes that on the basis of the re-coding it has no effect on the racial coefficients. Only five of the variables in the 39-variable model have any substantial coding problems associated with them. (For these purposes the court is defining a "substantial problem" as a variable with more than 100 entries coded "U.") These five variables are the presence of a statutory aggravating factor B3 and B7D, hate, jealousy, and a composite of family, lover, liquor, or barroom quarrel. Baldus did not test any of his larger regressions to see what the effect would be. R 1701, *et seq.*, DB 96A, Schedule 4, DB 122, DB 123, Res. Exh. 47A.

In addition to the questionable handling of the "U" codes, there were other factors which might affect the outcome of the study where information was simply unknown or unused. In the Charging and Sentencing Study data related with the response "Other" was not used in subsequent analyses. In one factor, "special aggravating feature of the offense," there were 139 "Other" responses. R 1392, 1437.

Cases where the race of the victim was unknown were coded on the principle of imputation, as though the race of the victim was the same as the race of the defendant. R 1096.

There were 23 or 24 cases in the Procedural Reform Study and 62 or 63 cases in the Charging and Sentencing Study where the researchers did not know whether or not a penalty trial had been held. R 1522. Baldus, on the basis of the rate at which penalty trials were occurring in his other cases, predicted what proportion of these that probably proceeded to a penalty trial. The criteria for deciding precisely which of these cases proceeded to a penalty trial and which did not is unknown to the court. R 1101. It is not beyond possibility that the treatment of these 62 cases could have skewed the results. The data becomes important in modeling the prosecutorial decisions to seek a death sentence after there had been a conviction. Based on his sample Baldus projects that something over 760 murder convictions occurred. If the 62 cases were proportionally weighted by a factor of 2.3 (184 cases in the universe

divided by 1084 cases in the sample equals 2.3), the effect would be the same as if he were missing data on 143 cases. Said another way, he would be missing data on about 18 to 20% of all of the decisions he was seeking to study. *See generally* R 1119.

The study was also missing any information on race of the victim where there were multiple victims. R 1146–47. Further, Baldus was without information on whether or not the prosecutor offered a plea bargain in 40% of the cases. R 1152. One of the strength of the evidence questions related to whether or not there was a credibility problem with a witness. Such information was available only in a handful of files. R 532–33. Further, the data would not include anything on anyone who was convicted of murder and received probation. R 186.

Multiple regression requires complete correct data to be utilized. If the data is not correct the results can be faulty and not reliable. R 1505–06. Katz urged that the most accepted convention in dealing with unknowns is to drop the observations from the analysis. R 1501–04. Berk opined that missing data seldom makes any difference unless it is missing at the order of magnitude of 30 to 45%. R 1766. This opinion by Berk rests in part upon his understanding that the missing data, whether coded "U" or truly missing, was unknowable to the decision-maker. In the vast majority of cases this is simply not the case.

After a consideration of the foregoing, the court is of the opinion that the data base has substantial flaws and that the petitioner has failed to establish by a preponderance of the evidence that it is essentially trustworthy. As demonstrated above, there are errors in coding the questionnaire for the case *sub judice*. This fact alone will invalidate several important premises of petitioner's experts. Further, there are large numbers of aggravating and mitigating circumstances data about which is unknown. Also, the researchers are without knowledge concerning the decision made by prosecutors to advance cases to a penalty trial in a significant number of instances. The court's purpose here is not to reiterate the deficiencies but to mention several of its concerns. It is a major premise of a statistical case that the data base numerically mirrors reality. If it does not in substantial degree mirror reality, any inferences empirically arrived at are untrustworthy.

4. *Accuracy of the Models*

In a system where there are many factors which affect outcomes, an unadjusted binomial analysis cannot explain relationships. According to Baldus, no expert opinion of racial effects can rest upon unadjusted figures. R 731. In attempting to measure the effect of a variable of interest, Baldus testified that if a particularly important background variable is not controlled for, the coefficient for the variable of interest does not present a whole picture. Instead, one must control for the background effects of a variety of factors at once. One must, Baldus testified, identify the important factors in the system and control for them. R 694–95. Baldus also testified that a study which does not focus on individual stages in the process and does not control for very many background factors is limited in its power to support an inference of discrimination. R 146–47. Because he realized the necessity of controlling for all important background variables, he read extensively, consulted with peers, and from these efforts and from his prior analysis of data sets from California and Arkansas, he sought in his questionnaires to obtain information on every variable he believed would bear on the matter of death-worthiness of an individual defendant's case. His goal was to create a data set that would allow him to control for all of those background factors. R 194–95, 739. At this point it is important to emphasize a difference between the Procedural Reform Study and the Charging and Sentencing Study. The Procedural Reform Study contains no measures for strength of the evidence. Because Baldus was of the opinion that this could be a factor in wheth-

er or not capital punishment was imposed, information regarding the strength of the evidence was collected in the Charging and Sentencing Study. R 124, 286.

Baldus collected data on over 500 factors in each case. From the 500 variables he decided to select 230 for inclusion in further statistical analysis. R 659. He testified without further explanation that these 230 variables were the ones that he would expect to explain who received death sentences and who did not. R 661. X 631. Based on this testimony it follows that any model which does not include the 230 variables may very possibly not present a whole picture.

The 230 variable-model has several deficiencies. It assumes that all of the information available to the data-gatherers was available to each decision-maker in the system at the time that decisions were made. R 1122. This is a questionable assumption. To the extent that the records of the Parole Board accurately reflect the circumstances of each case, they present a retrospective view of the facts and circumstances. That is to say, they reflect a view of the case after all investigation is completed, after all pretrial preparation is made, after all evidentiary rulings have been handed down, after each witness has testified, and after the defendant's defense or mitigation is aired. Anyone who has ever tried a lawsuit would testify that it is seldom and rare when at progressive stages of the case he knows as much as he knows by hindsight. Further, the file does not reflect what was known to the jury but only what was known to the police. Legal literature is rife with illustrations of information known reliably to the parties which they never manage to get to the factfinders. Consequently, the court feels that any model produced from the data base available is substantially flawed because it does not measure decisions based on the knowledge available to the decision-maker.

Beyond that defect, there are other reasons to distrust the 230-variable model or any of the others proposed by Baldus. Statisticians have a method for measuring what portion of the variance in the dependent variable (here death sentencing rate) is accounted for by the independent variables included in the model. This measure is known as an adjusted r^2. The r^2 values for a model which is perfectly predictive of changes in the dependent variable would have a value of 1.0. The r^2 values for the models utilized by Woodworth to check the validity of his statistical techniques range from .15 to .39. The r^2 for the 230-variable model is between .46 and .48. The difference between the r^2 value and 1 may be explained by one of two hypotheses. The first is that the other unaccounted-for factors at work in the system are totally random or unique features of individual cases that cannot be accounted for in any systematic way. The other theory is that the model does not model the system. R 1266–69, GW 4, Table 1. As will appear hereafter, neither Baldus nor Woodworth believes that the system is random.

In summary, the r^2 measure is an indicia of how successful one has been with one's model in predicting the actual outcome of cases. R 1489. As the 230-variable model does not predict the outcome in half of the cases and none of the other models produced by the petitioner has an r^2 even approaching .5, the court is of the opinion that none of the models are sufficiently predictive to support an inference of discrimination.

The regression equation, discussed in greater detail hereafter, postulates that the value of the dependent variable in a given case is the sum of the coefficients of all of the independent variables plus "U." In the equation the term "U" refers to all unique characteristics of an individual case that have not been controlled for on a system-wide basis. X 51–52. If the model is not appropriately inclusive of all of the systematic factors, then the "U" value will contain random influences as well as systematic influences. X 90. The r^2 value is a summary statistic which describes collectively all of the "U" terms.

Sometimes it is said that "U" measures random effects. Woodworth testified that

randomness does not necessarily reflect arbitrariness. He continued, "The world really isn't random. When we say something is random, we simply mean it's unaccountable, and that whatever does account for it is unique to each case.... This randomness that we use is a tag that phenomena which are unpredictable on the basis of variables we have observed [sic]." R 1272–73. By implication this means that even in the 230-variable model it is unique circumstances or uncontrolled-for variables which preponderate over the controlled-for variables in explaining death sentencing rates. This is but another way of saying that the models presented are insufficiently predictive to support an inference of discrimination.

None of the models presented have accounted for the alternative hypothesis that the race effects observed cannot be explained by unaccounted-for factors. This is further illustrated by an experiment that Katz conducted. He observed that when he controlled only for whether or not there had been a murder indictment and tried to predict the outcome based solely on the race of the victim, he obtained a regression coefficient of .07 which was statistically significant at the .00000000000000000005 level. He further observed that by the time Baldus had controlled for 230 variables, the "P" value or test of statistical significance was only approximately .02. He stated as his opinion that the positive value of the race of the victim coefficient would not disappear because it was a convenient variable for the equation to use in explaining actual outcome where so many cases in the sample were white victim cases. It was his opinion, however, that the race of the victim coefficient would become statistically insignificant with a model with a higher r^2 which better accounted for all of the non-racial variables including interaction variables and composite variables which could be utilized. R 1563–70. This methodical decline in statistical significance of the race of the victim and race of the defendant effects as more variables are controlled for is demonstrated graphically in Table 1 which is attached to the opinion as Appendix A.[2] There, it will be observed that if an additional 20 background variables are added beyond the 230-variable model and the data is adjusted to show the effect on death sentencing rates of appellate review, both the size of the coefficient for race of the victim and race of the defendant decreases by one-third, and the statistical significance decreases to .04 and .05, respectively.[3]

Based on the evidence the court is unable to find either way with respect to Katz's hypothesis. From the evidence offered in support and in contradiction of the hypothesis, the court does learn one thing. It was said that one indication of the completeness of a model is when one can find no additional variables to add which would affect the results obtained. The work by Katz and Woodworth shows instability in the findings of the small order models utilized in the study, and, therefore, it is further evidence that they are not sufficiently designed so as to be reliable. *See generally* R 1729, Table 1, GW 6, Res. Exh. 24.

Based on all the foregoing, the court finds that none of the models utilized by the petitioner's experts are sufficiently predictive to support an inference of discrimination.

2. The teaching of this chart has a universal lesson for courts. That lesson is that where there is a multitude of factors influencing the decision-maker, a court cannot rely upon tests of statistical significance to validate the data unless it is first shown that the statistical model is sufficiently predictive.

3. Woodworth commented on this opinion of Katz's. He testified that it was his observation that after about ten variables were added to the model, the precipitous drop in levels of statistical significance leveled out, and, therefore, he was of the opinion that it would require the addition of an enormous number of variables to make the coefficient insignificant. He had no opinion as to whether the addition of a number of variables would inevitably remove the effect. In fact, however, the trend line on GW 6 for statistical significance does not remain flat, even in Woodworth's studies. From the 10 to 20-variable models to the 230-variable models, the "P" value declines from something just under .00003 to something just over .005.

5. *Multi-Colinearity.*

As illustrated in Table 1, the petitioner introduced a number of exhibits which reflected a positive coefficient for the race of the victim and race of the defendant. The respondent has raised the question of whether or not those coefficients are in fact measuring racial disparities or whether the racial variables are serving as proxies for other permissible factors. Stated another way, the respondent contends that the Baldus research cannot support an inference of discrimination because of multi-colinearity.

If the variables in an analysis are correlated with one another, this is called multi-colinearity. Where this exists the coefficients are difficult to interpret. R 1166. A regression coefficient should measure the impact of a particular independent variable, and it may do so if the other variables are totally uncorrelated and are independent of each other. If, however, there is any degree of interrelationship among the variables, the regression coefficients are somewhat distorted by that relationship and do not measure exactly the net impact of the independent variable of interest upon the dependent variable. Where multi-colinearity obtains, the results should be viewed with great caution.

In the Charging and Sentencing Study a very substantial proportion of the variables are correlated to the race of the victim and to the death sentencing result. R 1141–42. All or a big proportion of the major non-statutory aggravating factors and statutory aggravating factors show positive correlation with both the death sentencing result and the race of the victim. R 1142. More than 100 variables show statistically significant relationships with both death sentencing results and the race of the victim. R 1142. Because of this it is not possible to say with precision what, if any, effect the racial variables have on the dependent variable. R 1148, 1649. According to Baldus, tests of statistical significance will not always detect errors in coefficients produced by multi-colinearity. R 1138, DB 92.

Katz conducted experiments which further demonstrated the truth of an observation which Baldus made: white-victim cases tend to be more aggravated while black-victim cases tend to be more mitigated. Using the data base of the Procedural Reform Study, Katz conducted an analysis on 196 white-victim cases and 70 black-victim cases which had in common the presence of the statutory aggravating factor B2.[4] Factor by factor, he determined whether white-victim cases or black-victim cases had the higher incidence of each aggravating and mitigating factor. The experiment showed that there were 25 aggravating circumstances which appeared at a statistically significant higher proportion in cases involving one racial group than they did in the other. Of these 25 aggravating circumstances, 23 of these occurred in white-victim cases and only 2 occurred in black-victim cases. Likewise with mitigating factors it was determined that 12 mitigating factors appeared in a higher proportion of black-victim cases whereas only one mitigating feature appeared in a higher proportion of white-victim cases. The results of this latter analysis were also statistically significant. R 1472, *et seq.*, Res Exh. 28. Similar or more dramatic results were obtained when the experiment was repeated with statutory factors B1, 3, 4, 7, 9 and 10. Res Exh. 29–34. R 1477–80.

As he had done with the data from the Procedural Reform Study, Katz conducted an analysis to discover the relative presence or absence of aggravating or mitigating circumstances in white- and black-victim cases, using the Charging and Sentencing Study data. Only aggravating or mitigating circumstances shown to be significant at the .05 level were utilized. Unknown responses were not considered. With but slight exception, each aggravating factor was present in a markedly high-

4. Katz utilized Baldus's characterization of factors as to whether they were aggravating or mitigating.

er percentage of white-victim cases than in black-victim cases, and conversely, the vast majority of the mitigating circumstances appeared in higher proportions in black-victim cases. Res.Exh. 49, 50, R 1534-35. Similar observations were made with reference to cases disposed of by conviction of voluntary manslaughter. Res.Exh. 51, 52, R 1536.

Yet another experiment was conducted by Katz. He compared the death sentencing rates for killers of white and black victims at steps progressing upwards from the presence of no statutory aggravating circumstances to the presence of six such circumstances. At the level where there were three or four statutory aggravating circumstances present, a statistically significant race of the victim effect appeared. He then compared the aggravating and mitigating circumstances within each group and in each instance found on a factor-by-factor basis that there was a higher number of aggravating circumstances which occurred in higher proportions in white-victim cases and a number of mitigating factors occurred in higher proportions in black-victim cases. The results were statistically significant. Res.Exh. 36, 37, R 1482.

All of the experts except Berk seemed to agree that there was substantial multi-colinearity in the data. Berk found rather little multi-colinearity. R 1756. Woodworth observed that multi-colinearity has the effect of increasing the standard deviation of the regression coefficients, and he observed that this would reduce the statistical significance. According to Woodworth the net effect of multi-colinearity would be to dampen the effect of observed racial variables. R 1279-80. He also testified that he had assured himself of no effect from multi-colinearity because they were able to measure the disparities between white-victim and black-victim cases at similar levels of aggravation. For these two reasons Woodworth had the opinion that higher levels of aggravation in white-victim cases were not relevant to any issue. R 1297.

The court cannot agree with Woodworth's assessment. He and Baldus seem to be at odds about whether tests of statistical significance will reveal and protect against results produced by multi-colinearity. His second point is also unconvincing. He contends that because he can measure a difference between the death sentencing rate in white-victim cases and black-victim cases at the same level of aggravation (and presumably mitigation), then the positive regression coefficients for this variable are not being produced by multi-colinearity. If Woodworth's major premise were correct, his conclusion might be tenable. The major premise is that he is comparing cases with similar levels of aggravation and mitigation. He is not. As will be discussed hereafter, he is merely comparing cases which have similar aggravation indices based on the variables included in the model. None of Woodworth's models on which he performed his diagnostics are large order regression analyses. Accordingly, they do not account for a majority either of aggravating or mitigating circumstances in the cases. Therefore, in the white-victim cases there are unaccounted-for systematic aggravating features, and in the black-victim cases there are unaccounted-for systematic mitigating features. As will be seen hereafter, aggravating factors do increase the death penalty rate and mitigating factors do decrease the death penalty rate. Therefore, at least to the extent that there are unaccounted-for aggravating or mitigating circumstances, white-victim cases become a proxy for aggravated cases, and black-victim cases become a proxy, or composite variable, for mitigating factors.

The presence of multi-colinearity substantially diminishes the weight to be accorded to the circumstantial statistical evidence of racial disparity.

e. *Petitioner's Best Case and Other Observations*

Based on what has been said to this point, the court would find that the petitioner has failed to make out a prima

face case of discrimination based either on race of the victim or race of the defendant disparity. There are many reasons, the three most important of which are that the data base is substantially flawed, that even the largest models are not sufficiently predictive, and that the analyses do not compare like cases. The case should be at an end here, but for the sake of completeness, further findings are in order. In this section the statistical showings based on the petitioner's most complete model will be set out, together with other observations about the death penalty system as it operates in the State of Georgia.

Woodworth testified, "No, the system is definitely not purely random. This system very definitely sorts people out into categories on rational grounds. And those different categories receive death at different rates." R 1277. An analysis of factors identified by Baldus as aggravating and mitigating, when adjusted to delete unknown values, gives a picture of a rational system when measured against case outcome. Virtually without exception, the presence of aggravating factors increases as the outcome moves from voluntary manslaughter to life sentence to death sentence. Conversely, factors identified by Baldus as being mitigating decrease in presence in cases as the outcome moves from voluntary manslaughter to life sentence to death sentence. R 1532, Res. Exh. 48.

These observations, other testimony by all of the experts, and the court's own analysis of the data put to rest in this court's mind any notion that the imposition of the death penalty in Georgia is a random event unguided by rational thought. The central question is whether any of the rationales for the imposing or not imposing of the death penalty are based on impermissible factors such as race of the defendant or race of the victim. In *Baldus's* opinion, based on his entire study, there are systematic and substantial disparities existing in the penalties imposed upon homicide defendants in the State of Georgia based on race of the homicide victim. Further, he was of the opinion that disparities in death sentencing rates do exist based on the race of the defendant, but they are not as substantial and not as systematic as is the case with the race of the victim effect. He was also of the opinion that both of these factors were at work in Fulton County. R 726–29. *The court does not share Dr. Baldus's opinion to the extent that it expresses a belief that either of these racial considerations determines who receives the death penalty and who does not.*

Petitioner's experts repeatedly testified that they had added confidence in their opinions because of "triangulation." That is, they conducted a number of different statistical studies and they all produced the same results. R 1081–82. This basis for the opinion is insubstantial for two reasons. First, many tests showed an absence of a race of the defendant effect or an absence of a statistically significant race of the defendant effect or a statistically insignificant modest race of the defendant effect running against white defendants. As will be seen below, the race of the victim effect observed, while more consistent, did not always appear at a statistically significant level in every analysis. Second, Baldus's confidence is predicated upon a navigational concept, triangulation, which presumes that the several bearings being taken are accurate. The lore of the Caribbean basin is rich with tales of island communities supporting themselves from the booty of ships which have foundered after taking bearings on navigational aids which have been mischievously rearranged by the islanders. If one is going to navigate by triangulation, one needs to have confidence in the bearings that are being shot. As discussed earlier, Baldus is taking his bearings off of many models, none of which are adequately inclusive to predict outcomes with any regularity.

Baldus has testified that his 230-variable model contains those factors which might best explain how the death penalty is imposed. The court, therefore, views results produced by that model as the most reliable

evidence presented by the petitioner. Additionally, in some tables Baldus employed a 250-variable model which adjusted for death sentencing rates after appellate review by Georgia courts. The race of the victim and race of the defendant effects, together with the "P" values, are shown in the table below.

TABLE 2

RACIAL EFFECTS TAKING INTO ACCOUNT ALL DECISIONS IN THE SYSTEM – LARGE SCALE REGRESSIONS

Weighted Least Squares Regression Results

Coefficients and Level of Statistical Significance

250 Variable Model

Race of the Victim	Race of Defendant
.06	.06
(.02)	(.02)

250 Variable Model

After Adjustment for Georgia Appellate Review

Race of the Victim	Race of Defendant
.04	.04
(.04)	(.05)

In viewing Table 2, it is important to keep in mind that it purports to measure the net effect of the racial variables on all decisions made in the system from indictment forward. It shows nothing about the effect of the racial variables on the prosecutor's decision to advance a case to a penalty trial and nothing about the effect of the racial variables on the jury and its decision to impose the death penalty.

At this point it is instructive to know how Dr. Baldus interpreted his own findings on the racial variables. He says that the impact of the racial variable is small. R 831. The chances that anybody is going to receive a death sentence is going to depend on what the other aggravating and mitigating circumstances are in the case. R 828. At another point Baldus testified that:

> [t]he race of the victim in this system is clearly not the determinant of what happened, but rather that it is a factor like a number of other factors, that plays a role and influences decision making. The one thing that's, that struck me from working with these data for some time, there is no one factor that determines what happens in the system. If there were, you could make highly accurate predictions of what's going to happen. This is a system that is highly discretionary, highly complex, many factors are at work in influencing choice, and no one factor dominates the system. It's the result of a combination of many different factors that produce the results that we see, each factor contributing more or less influence.

R 813. And at another point Dr. Baldus interpreted his data as follows:

> The central message that comes through is the race effects are concentrated in categories of cases where there's an elevated risk of a death sentence. There's no suggestion in this research that there is a uniform, institutional bias that adversely affects defendants in white victim cases in all circumstances, of a black defendant in all cases. There's nothing to support that conclusion. It's a very complicated system.

R 842.

Because of these observations, the testimony of other witnesses, and the court's own analysis of the data, it agrees that any racial variable is not determinant of who is going to receive the death penalty, and, further, the court agrees that there is no support for a proposition that race has any effect in any single case.

An exhibit, DB 95, is produced in part in Table 3 below. It is perhaps the most significant table in the Baldus study. This table measures the race of the victim and the race of the defendant effect in the prosecutorial decision to seek the death sentence and in the jury sentencing decision to impose the death sentence. This is one of the few exhibits prepared by Baldus which utilizes data both from the Procedural Reform Study and the Charging and Sentencing Study. The first column shows the racial effects after controlling for 230 variables in the Charging and Sentencing Study and 200 variables in the Procedural Reform Study.

TABLE 3

REGRESSION COEFFICIENTS (WITH THE LEVEL OF STATISTICAL SIGNIFICANCE IN PARENTHESES) FOR RACIAL VARIABLES IN ANALYSES OR PROSECUTORIAL DECISIONS TO SEEK AND JURY DECISIONS TO IMPOSE CAPITAL PUNISHMENT

	Controlling for All Factors in File (230 variables in Charging & Sentencing Study; 200 variables in Procedural Reform Study)	
	Regardless of Statistical Significant	If Statistically Significant at .10 Level
I. Prosecutor Decision to Seek a Death Sentence		
A. Race of Victim		
1. Charging and Sentencing Study	.21 (.06)	.18 (.0001)
2. Procedural Reform Study	.12 (.01)	.13 (.0001)
B. Race of Defendant		
1. Charging and Sentencing Study	.09 (.42)	.14 (.002)
2. Procedural Reform Study	.01 (.96)	.03 (.42)
II. Jury Sentencing Decisions [1]		
A. Race of Victim	[2]	.05 (.37)
1. Charging and Sentencing Study		.06 (.42)
2. Procedural Reform Study		
B. Race of Defendant		-.04 (.42)
1. Charging and Sentencing Study		-.02 (.75)
2. Procedural Reform Study		

[1] Unweighted data used
[2] Simultaneous adjustment for all factors in the files was not possible because of the limited number of penalty trial decisions. (From DB 95)

The coefficients produced by the 230-variable model on the Charging and Sentencing Study data base produce no statistically significant race of the victim effect either in the prosecutor's decision to seek the death penalty or in the jury sentencing decision. A 200-variable model based on the Procedural Reform data base shows a statistically significant race of the victim effect at work on the prosecutor's decision-making, but that model is totally invalid for it contains no variable for strength of the evidence, a factor which has universally been accepted as one which plays a large part in influencing decisions by prosecutors. Neither model produces a statistically significant race of the defendant effect at the level where the prosecutor is trying to decide if the case should be advanced to a penalty trial. Neither model produces any evidence that race of the victim or race of the defendant has any statistically sig-

nificant effect on the jury's decision to impose the death penalty. The significance of this table cannot be overlooked. The death penalty cannot be imposed unless the prosecutor asks for a penalty trial and the jury imposes it. *The best models which Baldus was able to devise which account to any significant degree for the major non-racial variables, including strength of the evidence, produce no statistically significant evidence that race plays a part in either of those decisions in the State of Georgia.*[5]

The same computations were repeated using only factors which were statistically significant at the .10 level.[6] The court knows of no statistical convention which would permit a researcher arbitrarily to exclude factors on the basis of artificial criteria which experience and other research have indicated have some influence on the decisions at issue. The fact that a variable may not be statistically significant is more likely a reflection of the fact that it does not occur often, and not any sort of determination that when it does occur it lacks effect. Accordingly, the second model, set out in Table 3, does not meet the criterion of having been validated by someone knowledgeable about the inner workings of the decision-making process.

The results in the second column are reproduced here because they demonstrate some other properties of the research. It is noted first that the race of the victim effect is lower in the Procedural Reform Study than in the Charging and Sentencing Study. As the Procedural Reform Study represents a universe of all cases and the Charging and Sentencing Study is a random sample, one possible explanation for the disparity in magnitude might be that the sampling techniques utilized in the Charging and Sentencing Study somehow overestimated the coefficients. Another interesting observation from this study is that even when the data is artificially manipulated, no statistically significant race of the victim or race of the defendant effect appears at the jury decision level. Last, this table demonstrates a property of the analyses throughout regarding race of the defendant. To the extent that race of the defendant appears as a factor, it sometimes appears as a bias against white defendants and sometimes appears as a bias against black defendants; very often, whatever bias appears is not statistically significant.

Finally, this table is an illustration of a point which the court made earlier. At the beginning, in assessing the credibility of the witnesses, the court noticed that all seemed to have something of a partisan bias. Thereafter, it noted that the results of certain diagnostics respecting the worst case analysis in Woodworth's work were not reported in the exhibits given the court. Here, in this table, we are given no outcomes based on the larger scaled regressions for the racial variables at the jury sentencing level. It is said that the data was not provided because it was not possible to conduct simultaneous adjustment for all factors in the file because of the limited number of penalty trial decisions. From all that the court has learned about the methods employed, it does not understand that the analysis was impossible, but instead understands that because of the small numbers the results produced may not have been statistically significant.

The figures on racial disparities in prosecutorial and jury decision-making do not reflect the effects of racial disparities that might have resulted in earlier phases of the system. R 935. A stepwise regression analysis of the statewide data in the Charging and Sentencing Study was done in an effort to measure the race of the victim and race of the defendant effects at different stages

5. As an aside, the court should think that this table should put to rest the sort of stereotypical prejudice against Southern jurisdictions typified in the petitioner's brief by reliance on evidence in the Congressional Record in the 1870's concerning the existence of a disregard by Southern officials for the value of black life.

6. The regression coefficient of an independent variable would be the same regardless of whether it was a rare event or a frequent event. X 33

of the procedure from indictment through the imposition of the death penalty.[7] This regression analysis suggested that there is an increased willingness by prosecutors to accept pleas to voluntary manslaughter if the race of the victim is black. R 1062–68, DB 117. This suggests a possibility that the racial effects observed in Table 2 may be the result of bias at a plea bargaining stage.[8] This is not established by the evidence, and it is immaterial to this case, for Baldus did not believe that McCleskey's case would have had any likelihood of being disposed of on a voluntary manslaughter plea. R 1064–65. Baldus noted that there were strong effects with respect to both race of the defendant and race of the victim at the plea bargaining level. R 1040. It is to be remembered that on this point his data base was far from complete. Finally, it is noted that this study did not attempt to discern if any of the racial disparities noted at the plea bargaining stages could be explained by any of the current theories on the factors governing plea bargaining. R 1159–63.

7. *What a Multivariate Regression Can Prove*

Before one can begin to utilize the results of the Baldus study, whether from the larger order regressions or from the small models, an understanding of the techniques employed is necessary. Such an understanding produced in the court's mind other qualifiers which at least in this case substantially diminish the weight of the evidence produced.

Regression analysis is a computational procedure that describes how the average outcome in a process, here the death sentencing rate, is related to particular characteristics of the cases in the system. A least squares regression coefficient displays the average difference in the death penalty rate across all cases caused by the independent variable of interest. In a regression procedure one may theoretically measure the impact of one variable of interest while "controlling" for other independent variables. Conceptually, the coefficient of the variable of interest is the numerical difference in death sentencing rates between all cases which have the variable of interest and all cases which do not. R 689, *et seq.*, 1222–23. The chief assumption of a weighted least square regression is that the effect of the variable of interest is consistent across all cases. Woodworth testified that that assumption was not altogether warranted in this case.[9] That the variable of interest, here race of the victim, is not the same against all cases is graphically seen in a preliminary cross tabulation done by Baldus. In this experiment, cases which were similar in that they had a few aggravating and mitigating factors in common were grouped into four subgroups. The race of the victim disparity ranged from a low of .01 through .04 to .15 and finally to .25. The weighted least squares regression coefficient for these same cases was .09. R 761, DB 76, DB 77.

Statistical significance is another term which the court and the parties used regularly. This term connotes a test for rival hypotheses. There is a possibility that an effect could be present purely by chance, or by the chance combination of bad luck in drawing a sample, or by chance combination of events in the charging and sentencing process that may produce an accidental disparity which is not systematic. Statisti-

7. Stepwise regression is a process carried out by a computer which selects the background variables sequentially based on which provides the best fit. It makes no judgment as to whether or not the variables it selects might in reality have anything to do with the decision. Any model produced by stepwise regression would not meet the legal statistical conventions discussed earlier in that the model is not validated by a person who is by experience or learning acquainted with how the process actually works.

8. McCleskey was offered a life sentence in return for a guilty plea. (See State Habeas Transcript, Testimony of Turner).

9. He testified however that the data was interpretable because he convinced himself that the violations of the assumption were not in themselves responsible for the findings of significant racial effects. R 1223–24, 1228.

cal significance computes the probability that such a disparity could have arisen by chance, and, therefore, it tests the rival hypothesis that chance accounts for the results that were obtained. R 1244–45. Tests of statistical significance are a measure of the amount by which the coefficient exceeds the known standard deviation in the variable, taking into account the size of the sample. Considering the values used in this study, a statistical significance at the .05 level translates into a two-standard deviation disparity, and a statistical significance at the .01 level approaches a three-standard deviation level. R 1246–47. R 712–17. As noted earlier a low "P" value, a measure of statistical significance, does not, at least in the case of multi-variate analysis, assure that the effect observed by any one model is in fact real.

The use of regression analysis is subject to abuse. Close correlations do not always say anything about causation. Further, a regression analysis is no better than the data that went into the analysis. It is possible to obtain a regression equation which shows a good statistical fit in the sense of both low "P" values and high r^2 values where one has a large number of variables, even when it is known in advance that the data are totally unrelated to each other. R 1636–37.

What the regression procedure does by algebraic adjustment is somewhat comparable to a cross tabulation analysis. It breaks down the cases into different sub-categories which are regarded as having characteristics in common. The variable of interest is calculated for each sub-category and averaged across all sub-categories. R 791–92.

The model tries to explain the dependent variable by the independent variables that it is given. It does this by trying to make the predicted outcome the same as the actual outcome in terms of the factors that it is given. R 1487–88. For example, if a regression equation were given ten independent variables in a stagewise process, it would guess at the regression coefficient for the first variable by measuring the incremental change in the dependent variable caused by the addition of cases containing a subsequent independent variable. X 29. After the initial mathematical computation, the equation then goes back and re-computes the coefficients it arrived at earlier, using all of the subsequent regression coefficients that it has calculated. It continues to go through that process until coefficients which best predict actual outcome are arrived at for each variable. X 43–46.

By its nature, then, the regression equation can produce endless series of self-fulfilling prophecies because it always attempts to explain actual outcomes based on whatever variables it is given. If, for example, the data base included information that of the 128 defendants who received the death penalty, 122 of them were right-handed, the regression equation would show that the system discriminated against right-handed people. This is so because that factor occurs so often that it is the most "obvious" or "easy" explanation for the outcomes observed. In the case at bar, there are 108 white-victim cases where death was imposed and 20 black-victim cases where death was imposed. DB 63. Accordingly, the regression coefficients for the racial variables could have been artificially produced because of the high incidence of cases in which the victim was white.

Another feature of Baldus's analyses is that he is trying to explain dichotomous outcomes (life or death) with largely dichotomous independent variables (multiple stabbing present or not present) and a regression equation requires continuous dependent and independent variables. Accordingly, Baldus developed indices for the dependent variable (whether or not the death penalty was imposed). He utilized an average rate for a group of cases. For the independent variables he developed an artificial measure of similarity called an aggravation index to control simultaneously for aggravating and mitigating circumstances so that cases could be ranked on a continuous scale. R 1484. It is important

to understand that the cases being compared in the regression analyses used here are not at all factually similar. Their principal identity is that their aggravation index, the total of all positive regression coefficients minus all negative regression coefficients, is similar. X 14–15. The whole study rests on the presumption that cases with similar aggravation indexes are similarly situated. R 1311. This presumption is not only rebuttable, it is rebutted, if by nothing else, then by common sense. As Justice Holmes observed in *Towne v. Eisner*, 245 U.S. 418, 38 S.Ct. 158, 62 L.Ed. 372 (1918):

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

Id. at 425, 38 S.Ct. at 158, *quoting Lamar v. United States*, 240 U.S. 60, 65, 36 S.Ct. 255, 256, 60 L.Ed. 526 (1916). The same thought, it seems to the court, is apropos for the aggravation index. It allows a case with compelling aggravating circumstances, offset only by a series of insignificant mitigating circumstances, to be counted as equal to a case with the same level of aggravation and one substantial mitigating factor having the same numerical value as the series of trifling ones in the first case. The court understands that strength of the evidence measures generally are positive coefficients. To the extent that this is true, a strong evidentiary case with weak aggravating circumstances would be considered the same as a brutal murder with very weak evidence. Other examples abound, but the point is that there is no logical basis for the assumption that cases with similar aggravation indices are at all alike. Further, the aggravation index for any given case is a function of the variables that are included in the model. Any change in the variables included in the model will also change the aggravation index of most, if not all, cases.

The variability of the aggravation index as factors are added or deleted is well demonstrated by Respondent's Exhibit 40. One case comparison will serve as an example. In a life sentence case, C 54, an aggravation index (or predicted outcome index, R 1485) was computed using a six-variable model. Calculation produced an index of .50. Katz conducted four additional regressions, each adding additional factors. By the time the more inclusive regression number five was performed, the aggravation index or predicted outcome was .08 (0 equals no death penalty, 1 equals death penalty). In a death case, C 66, the first regression analysis produced an index of .50. However, the aggravation coefficient or predicted outcome rose to .89 when the facts of the case were subjected to the fifth regression analysis. Thence, two cases which under one regression analysis appeared to be similar, when subjected to another analysis may have a totally different aggravation index. Res.Exh. 40, R 1483–1501.

In interpreting the Baldus data it is important to understand what he means when he says that he has controlled for other independent variables or held other individual variables constant. What these terms usually mean is that a researcher has compared cases where the controlled-for variables are present in each case and where the cases are divided into groups where the variable of interest is present and where the variable of interest is not present. That is not what occurs in regression analysis. To be sure, the cases are divided into groups where the variable of interest is present and groups where it is not present. There is, however, absolutely no assurance that the background variables being controlled for are present in all of the cases in any of the cases or present in the same combination in any of the cases. Consequently, other factors are not being held constant as that term is usually used. *See generally* R 152, X 7, 19–25.

Courts are accustomed to looking at figures on racial disparity and understanding that the figure indicates the extent or degree of the disparity. It is often said that statistical evidence cannot demonstrate discrimination unless it shows gross disparities. Contrary to the usual case, the court

has learned that at least in this case the size of a regression coefficient, even one statistically significant at the .05 level, says nothing about the specific degree of disparity or discrimination in the system. All the regression coefficient indicates is that the difference in average outcome where the racial variable is present from cases where it is not present is large enough to enable one to say that the true mean of both groups are not exactly equal. R 1635, 1670–71. Baldus made an effort to demonstrate the relative importance of the racial variables by showing them in an array of coefficients for other variables. The court later learned, however, that where some of the variables are binary or dichotomous and some are continuous (for example, number of mitigating features present), one cannot use the size of the regression coefficient as an indication of the relative strength of one variable to another. R 1783.

Consistent with the difficulty in quantifying the effect of any variable found to be at work in the system, Baldus testified that a regression analysis really has no way of knowing what particular factors carry the most weight with the decision-maker in any one case. R 1141. Based on his entire analysis Baldus was unable to quantify the effect that race of the victim may have had in McCleskey's case. R 1083–85. After a review of the Baldus study, Berk was unable to say whether McCleskey was singled out to receive the death penalty because his victim was white, nor was he able to say that McCleskey would have escaped the death penalty if his victim had been black. Berk went on to testify:

> Models that are developed talk about the effects on the average. They do not depict the experience of a single individual. What they say, for example, that on the average, the race of the victim, if it is white, increases on the average the probability . . . (that) the death sentence would be given.
>
> Whether in a given case that is the answer, it cannot be determined from statistics. R 1785.

In summary, then, Baldus's findings from the larger scale regressions or from any of the others must be understood in light of what his methods are capable of showing. They do not compare identical cases, and the method is incapable of saying whether or not any factor had a role in the decision to impose the death penalty in any particular case. A principal assumption which must be present for a regression analysis to be entirely reliable is that the effects must be randomly distributed—that is not present in the data we have. The regression equation is incapable of making qualitative judgments and, therefore, it will assign importance to any feature which appears frequently in the data without respect to whether that factor actually influences the decision-maker. Regression analysis generally does not control for background variables as that term is usually understood, nor does it compare identical cases. Because Baldus used an index method, comparable cases will change from model to model. The regression coefficients do not quantitatively measure the effect of the variables of interest.

With these difficulties, it would appear that multivariate analysis is ill suited to provide the court with circumstantial evidence of the presence of discrimination, and it is incapable of providing the court with measures of qualitative difference in treatment which are necessary to a finding that a prima facie case has been established with statistical evidence. Finally, the method is incapable of producing evidence on whether or not racial factors played a part in the imposition of the death penalty in any particular case. To the extent that McCleskey contends that he was denied either due process or equal protection of the law, his methods fail to contribute anything of value to his cause.

c. A Rebuttal to the Hypothesis

A part of Baldus's hypothesis is that the system places a lower value on black life than on white life. If this is true, it would

mean that the system would tolerate higher levels of aggravation in black victim cases before the system imposes the death penalty.

The respondent postulates a test of this thesis. It is said that if Baldus's theory is correct, then one would necessarily find aggravation levels in black-victim cases where a life sentence was imposed to be higher than in white-victim cases. This seems to the court to be a plausible corollary to Baldus's proposition. To test this corollary, Katz, analyzing aggravating and mitigating factors one by one, demonstrated that in life sentence cases, to the extent that any aggravating circumstance is more prevalent in one group than the other, there are more aggravating features in the group of white-victim cases than in the group of black-victim cases. Conversely, there were more mitigating circumstances in which black-victim cases had a higher proportion of that circumstance than in white-victim cases. R 1510–15, 1540, Res. Exh. 43, 53, 54.

Because Katz used one method to demonstrate relative levels of aggravation and Baldus used another, his index method, the court cannot say that this experiment alone conclusively demonstrates that Baldus's theory is wrong. It is, however, direct rebuttal evidence of the theory, and as such, stands to contradict any prima facie case of system-wide discrimination based on race of the victim even if it can be said that the petitioner has indeed established a prima facie case. This court does not believe that he has.

9. *Miscellaneous Observations on the Statewide Data*

So that a reader may have a better feeling of subsidiary findings in the studies and a better understanding of collateral issues in the case, some additional observations are presented on Baldus's study.

Some general characteristics of the sample contained in the Charging and Sentencing Study which the court finds of interest are as follows. The largest group of defendants was in the 18 to 25-year-old age group. Only ten percent had any history of mental illness. Only three percent were high status defendants. Only eight percent of the defendants were from out of state. Females comprised 13% of the defendants. Of all the defendants in the study 35% had no prior criminal record, while 65% had some previous conviction. Co-perpetrators were not involved in 79% of the cases, and 65% of the homicides were committed by lovers in a rage. High emotion in the form of hate, revenge, jealousy or rage was present in 66% of the cases. Only one percent of the defendants had racial hatred as a motive. Victims provoked the defendant in 48% of the cases. At trial 26% confessed and offered no defense. Self defense was claimed in 33% of the cases, while only two percent of the defendants relied upon insanity or delusional compulsion as a defense. Defendants had used alcohol or drugs immediately prior to the crime in 38% of the cases. In only 24% of the cases was a killing planned for more than five minutes. Intimate associates, friends, or family members accounted for 44% of the victims. Black defendants accounted for 67% of the total, and only 12% of the homicides were committed across racial lines. The largest proportion (58%) of the homicides were committed by black defendants against black victims. R 659, *et seq.*, DB 60.[10]

From the data in the Charging and Sentencing Study it is learned that 94% of all homicide indictments were for murder. Of those indicted for murder or manslaughter 55% did not plead guilty to voluntary man-

10. One thing of interest came out in DB 60 concerning the evaluation of the coders. In their judgment 92% of all the police reports that they studied indicated clear guilt. This is interesting in view of the fact that only 69% of all defendants tried for murder were convicted. This suggests either that the coders did not have enough experience to make this evaluation, or the more likely explanation is that the Parole Board summaries were obtained from official channels and only had the police version and had little if any gloss on the weaknesses of the case from the defendant's perspective.

slaughter. There were trials for murder in 45% of the cases and 31% of the universe was convicted of murder. In only ten percent of the cases in the sample was a penalty trial held, and in only five percent of the sample were defendants sentenced to death. DB 58, R 64–65. *See also* DB 59, R 655.

In his analysis of the charging and sentencing data, Baldus considered the effect of Georgia statutory aggravating factors on death sentencing rates, and several things of interest developed. The statutory aggravating circumstances are highly related or correlated to one another. That is to say that singularly the factors have less impact than they do in combination. Even when the impact of the statutory aggravating circumstances is adjusted for the impact of the presence of others, killing to avoid arrest increased the probability of a death sentence by 21 points, and committing a homicide during the course of a contemporaneous felony increased the probability of getting the death penalty by 12 points. R 709–11, DB 68. Where the B6 and B10 factors are present together, the death penalty rate is 39%. DB 64. Based on these preliminary studies one might conclude that a defendant committing a crime like McCleskey's had a greatly enhanced probability of getting the death penalty.

Of the 128 death sentences in the Charging and Sentencing Study population, 105 of those were imposed where the homicide was committed during the course of an enumerated contemporary offense. Further, it is noted that the probability of obtaining the death penalty is one in five if the B2 factor is present, a little better than one in five if the victim is a policeman or fireman, and the probability of receiving the death penalty is about one in three if the homicide was committed to avoid arrest. These, it is said, are the three statutory aggravating factors which are most likely to produce the death penalty, and all three were present *de facto* in McCleskey's case. DB 61.

When the 500 most aggravated cases in the system were divided into eight categories according to the level of the aggravation index, the death penalty rate rose dramatically from 0 in the first two categories, to about 7% in the next two, to an average of about 22% in the next two, to a 41% rate at level seven, and an 88% rate at level eight. Level eight was composed of 58 cases. The death sentencing rate in the 40 most aggravated cases was 100%. DB 90, R 882. Baldus felt that data such as this supported a hypothesis arrived at earlier by other social science researchers. This theory is known as the liberation hypothesis. The postulation is that the exercise of discretion is limited in cases where there is little room for choice. If the imposition of the death penalty or the convicting of a defendant is unthinkable because the evidence is just not there, or the aggravation is low, or the mitigation is very high, no reasonable person would vote for conviction or the death penalty, and, therefore, impermissible factors such as race effects will not be noted at those points. But, according to the theory, when one looks at the cases in the mid-range where the facts do not clearly call for one choice or the other, the decision-maker has broader freedom to exercise discretion, and in that area you see the effect of arbitrary or impermissible factors at work. R 884, R 1135.[11]

Baldus did a similar rank order study for all cases in the second data base. He divided the cases into eight categories with the level of aggravation increasing as the category number increased. In this analysis he controlled for 14 factors, but the record does not show what those factors were.

11. Part of the moral force behind petitioner's contentions is that a civilized society should not tolerate a penalty system which does not avenge the murder of black people and white people alike. In this connection it is interesting to note that in the highest two categories of aggravation there were only ten cases where the murderer of a black victim did not receive the death penalty while in eleven cases the death penalty under similar circumstances was imposed. This is not by any means a sophisticated statistical analysis, but even in its simplicity it paints no picture of a systematic deprecation of the value of black life.

The experiment showed that in the first five categories the death sentencing rate was less than one percent, and there was no race of the victim or race of the defendant disparity observed. At level six and nine statistically significant race of the victim disparities appeared at the 9 point and 27 point order of magnitude. Race of the defendant disparities appeared at the last three levels, but none were statistically significant. A minor race of the victim disparity was noted at level 7 but the figure was not significant. The observed death sentencing rates at the highest three levels were two percent, three percent, and 39%. DB 89. Exhibit DB 90 arguably supports Baldus's theory that the liberation hypothesis may be at work in the death penalty system in that it does show higher death sentencing rates in the mid-range cases than in those cases with the lowest and highest aggravation indices. On the other hand, Exhibit DB 89, which, unlike DB 90, is predicated on a multiple regression analysis, shows higher racial disparities in the most aggravated level of cases and lower or no racial disparities in the mid-range of aggravation. Accordingly, the court is unable to find any convincing evidence that the liberation hypothesis is applicable in this study.

Baldus created a 39-variable model which was used for various diagnostics. It was also used in an attempt to demonstrate that given the facts of McCleskey's case, the probability of his receiving the death penalty because of the operation of impermissible factors was greatly elevated. Although the model is by no means acceptable,[12] it is necessary to understand what is and is not shown by the model, as it is a centerpiece for many conclusions by petitioner's experts. On the basis of the 39-variable model McCleskey had an aggravation score of .52. Woodworth estimated that at McCleskey's level of aggravation the incremental probability of receiving the death penalty in a white-victim case is between 16 and 23 percentage points. R 1294-1738-40, GW 5, Fig. 2. If a particular aggravating circumstance were left out in coding McCleskey's case, it would affect the point where his case fell on the aggravation index. R 1747. Judging from the testimony of Office Evans, McCleskey showed no remorse about the killing and, to the contrary, bragged about the killing while in jail. While both of these are variables available in the data base, neither is utilized in the model. If either were included it should have increased McCleskey's index if either were coded correctly on McCleskey's questionnaire. Both variables on McCleskey's questionnaire were coded as "U," and so even if the variables had been included, McCleskey's aggravation index would not have increased because of the erroneous coding. If the questionnaire had been properly encoded and if either of the variables were included, McCleskey's aggravation index would have increased, although the court is unable to say to what degree. Judging from GW 5, if that particular factor had a coefficient as great as .15, the 39-variable or "mid-range" model would not have demonstrated any disparity in sentencing rates as a function of the race of the victim.

Katz conducted an experiment aimed at determining whether the uncertainty in

12. This model has only one strength of the evidence factor (DCONFESS) and that occurs only in 26 percent of the cases. Many other aggravating and mitigating circumstances which the court has come to understand are significant in explaining the operation of the system in Georgia are omitted. Among these are that the homicide arose from a fight or that it was committed by lovers in a rage. A variable for family, lover, liquor, barroom quarrel is included, and it might be argued that this is a proxy. However, the court notes from DB 60 that the included variable occurs in only 1,246 cases whereas the excluded variable (MADLOVER) occurs in 1,601 cases. Therefore, the universe of cases is not coextensive. Others which are excluded are variables showing that the victim was forced to disrobe, that the victim was found without clothing, that the victim was mutilated, that the defendant killed in a rage, that the killing was unnecessary to carry out the contemporaneous felony, that the defendant was provoked, that the defendant lacked the intent to kill, that the defendant left the scene of the crime, that the defendant resisted arrest, and that the victim verbally provoked the defendant.

sentencing outcome in mid-range could be the result of imperfections of the model. He arbitrarily took the first 100 cases in the Procedural Reform Study. He then created five different models with progressively increasing numbers of variables. His six-variable model had an r^2 of .26. His 31-variable model had an r^2 of .95.[13] Using these regression equations he computed the predictive outcome for each case using the aggravation index arrived at through his regression equations. As more variables were added, aggravation coefficients in virtually every case moved sharply toward 0 in life sentence cases and sharply toward 1 in death sentence cases. Respondent's Exhibit 40. In the five regression models designed by Katz, McCleskey's aggravation score, depending on the number of independent variables included, was .70, .75, 1.03, .87, and .85. R 1734, Res.Exh. 40.

Based on the foregoing the court is not convinced that the liberation hypothesis is at work in the system under study. Further, the court is not convinced that even if the hypothesis was at work in the system generally that it would suggest that impermissible factors entered into the decision to impose the death penalty upon McCleskey.

On another subject, Baldus testified that in a highly decentralized decision-making system it is necessary to the validation of a study to determine if the effects noted system-wide obtain when one examines the decisions made by the compartmentalized decision-makers. R 964–69. An analysis was done to determine if the racial disparities would persist if decisions made by urban decision-makers were compared with decisions made by rural decision-makers.[14] No statistically significant race of the victim or race of the defendant effect was observed in urban decision-making units. A .08 effect, significant at the .05 level, was observed for race of the victim in rural decision-making units, but when logistic regression analysis was used, the effect became statistically insignificant. The race of the defendant effect in the rural area was not statistically significant. The decisions in McCleskey's case were made by urban decision-makers.

Finally, the court makes the following findings with reference to some of the other models utilized by petitioner's experts. As noted earlier some were developed through a procedure called stepwise regression. What stepwise regression does is to screen the variables that are included in the analysis and include those variables which make the greatest net contribution to the r^2. The computer program knows nothing about the nature of those variables and is not in a position to evaluate whether or not the variable logically would make a difference. If the variables are highly correlated, the effect quite frequently is to drop variables which should not be dropped from a subject matter or substantive point of view and keep variables in that make no sense conceptually. So, stepwise regression can present a very misleading picture through the presentation of models which have relatively high r^2 and have significant coefficients but which models do not really mean anything. R 1652. *Because of this the court cannot accord any weight to any evidence produced by the model created by stepwise regression.*

Woodworth conducted a number of tests on five models to determine if his measures of statistical significance were valid. As there were no validations of the models he selected and none can fairly be said on the basis of the evidence before the court to model the criminal justice system in Georgia, Woodworth's diagnostics provide little if any corroboration to the findings produced by such models. R 1252, *et seq.*, GW 4, Table 1.

13. Katz testified that in most cases he randomly selected variables and in the case of the 31-variable model selected those variables arbitrarily which would most likely predict the outcome in McCleskey's case.

14. Based on the court's knowledge of the State of Georgia, it appears that Baldus included many distinctly rural jurisdictions in the category of urban jurisdictions.

In Exhibits DB 96 and DB 97, outcomes which indicate racial disparities at the level of prosecutorial decision-making and jury decision-making are displayed. At the hearing the court had thought that the column under the Charging and Sentencing Study might be the product of a model which controlled for sufficient background variables to make it partially reliable. Since the hearing the court has consulted Schedule 8 of the Technical Appendix (DB 96A) and has determined that only eleven background variables have been controlled for, and many significant background variables are omitted from the model. The other models tested in DB 96 and 97 are similarly inconclusive. (In this respect compare the variables listed on Schedule 8 through 13, inclusive, of the Technical Appendix with the variables listed in DB 59.) For this reason the court is of the opinion that DB 96 and DB 97 are probative of nothing.

10. *The Fulton County Data.*

McCleskey was charged and sentenced in Fulton County, Georgia.[15] Recognizing that the impact of factors, both permissible and impermissible, do vary with the decision-maker, and recognizing that some cases in this circuit have required that the statistical evidence focus on the decisions where the sentence was imposed, petitioner's experts conducted a study of the effect of racial factors on charging and sentencing in Fulton County.

The statistical evidence on the impact of racial variables is inconclusive. If one controls for 40 or 50 background variables, multiple regression analysis does not produce any statistically significant evidence of either a race of the defendant or race of the victim disparity in Fulton County. R 1000. Baldus used a stepwise regression analysis in an effort to determine racial disparities at different stages of the criminal justice system in the county. The stepwise regression procedure selected 23 variables. Baldus made no judgment at all concerning the appropriateness of the variables selected by the computer. The study indicated a statistically significant race of the victim and race of the defendant effect at the plea bargaining stage and at the stage where the prosecutor made the decision to advance the case to a penalty trial. Overall, there was no statistically significant evidence that the race of the victim or race of the defendant played any part in who received the death penalty and who did not. As a matter of fact, the coefficients for these two variables were very modestly negative which would indicate a higher death sentencing rate in black-victim cases and in white-defendant cases. Neither of the coefficients, however, approach statistical significance. R 1037–49.

The same patterns observed earlier with reference to the relative aggravation and mitigation of white and black-victim cases, respectively, continue when the Fulton County data is reviewed. In Fulton County, as was the case statewide, cases in which black defendants killed white victims seemed to be more aggravated than cases in which white defendants killed white victims. R 1554, 1561, Res.Exh. 66.

Based on DB 114 and a near neighbor analysis Baldus offered the opinion that in cases where there was a real risk of a death penalty one could see racial effects. R 1049–50. DB 114 is statistically inconclusive so far as the court can determine. The cohort study or near neighbor analysis also does not offer any support for Baldus's opinion. Out of the universe of cases in Fulton County Baldus selected 32 cases that he felt were near neighbors to McCleskey. These ran the gambit from locally notorious cases against Timothy Wes McCorquodale, Jack Carlton House, and Marcus Wayne Chenault to cases that were clearly not as aggravated as McCleskey's case. Baldus then divided these 32

15. As part of its findings on the Fulton County data, the court finds that there are no guidelines in the Office of the District Attorney of the Atlanta Judicial Circuit to guide the exercise of discretion in determining whether or not to seek a penalty trial. Further, it was established that there was only one black juror on McCleskey's jury. R 1316.

cases into three groups: More aggravated, equal to McCleskey, and less aggravated.

The court has studied the cases of the cohorts put in the same category as McCleskey and cannot identify either a race of the victim or race of the defendant disparity. All of the cases involve a fact pattern something like McCleskey's case in that the homicides were committed during the course of a robbery and in that the cases involve some gratuitous violence, such as multiple gunshots, etc. Except in one case, the similarities end there, and there are distinctive differences that can explain why either no penalty trial was held or no death sentence was imposed.

As noted above, Dr. Baldus established that the presence of the B10 factor, that is that the homicide was committed to stop or avoid an arrest, had an important predictive effect on the imposition of the death penalty. Also, the fact that the victim was a police officer had some predictive effect. Keeping these thoughts in mind, we turn to a review of the cases. Defendant Thornton's case (black defendant/black victim) did not involve a police officer. Further, Thornton was very much under the influence of drugs at the time of the homicide and had a history of a "distinct alcohol problem." In Dillard's case (black defendant/black victim) the homicide was not necessary to prevent an arrest and the victim was not a police officer. Further, Dillard's prior record was less serious than McCleskey's. In Leach's case (black defendant/black victim) the homicide was not committed to prevent an arrest and the victim was not a police officer. Further, Leach had only one prior felony and that was for motor vehicle theft. Leach went to trial and went through a penalty trial. Nowhere in the coder's summary is there any information available on Leach's defense or on any evidence of mitigation offered.

In the case of Gantt (black defendant/white victim) the homicide was not committed to avoid an arrest and the victim was not a police officer. Further, Gantt relied on an insanity defense at trial and had only one prior conviction. Crouch's case (white defendant/white victim) did not involve a homicide committed to prevent an arrest and the victim was not a police officer. Crouch's prior record was not as severe as McCleskey's and, unlike McCleskey, Crouch had a prior history of treatment by a mental health professional and had a prior history of habitual drug use. Further, and importantly, the evidence contained in the summary does not show that Crouch caused the death of the victim.

Arnold is a case involving a black defendant and a white victim. The facts are much the same as McCleskey's except that the victim was not a police officer but was a storekeeper. Arnold's case is aggravated by the fact that in addition to killing the victim, he shot at three bystander witnesses as he left the scene of the robbery, and he and his co-perpetrators committed another armed robbery on that day. Arnold was tried and sentenced to death. Henry's case (black defendant/white victim) did not involve a homicide to escape an arrest or a police victim. Henry's prior record was not as serious as McCleskey's, and, from the summary, it would appear that there was no direct evidence that the defendant was the triggerman, nor that the State considered him to be the triggerman.

In sum, it would seem to the court that Arnold and McCleskey's treatments were proportional and that their cases were more aggravated and less mitigated than the other cases classified by Baldus as cohorts. This analysis does not show any effect based either upon race of the defendant or race of the victim. *See generally* R. 985–90, DB 110.

Another type of cohort analysis is possible using Fulton County data. There were 17 defendants charged in connection with the killing of a police officer since *Furman*. Six of those, in Baldus's opinion, were equally aggravated to McCleskey's case. Four of the cases involved a black defendant killing a white officer, two involved a black defendant killing a black officer, and one involved a white defendant killing a white officer. There were two penalty trials. McCleskey's involved a

black defendant killing a white officer; the other penalty trial involved a black defendant killing a black officer. Only McCleskey received a death sentence. Three of the offenders pled guilty to murder, and two went to trial and were convicted and there was no penalty trial. *On the basis of this data and taking the liberation hypothesis into account, Baldus expressed the opinion that a racial factor could have been considered, and that factor might have tipped the scales against McCleskey.* R 1051-56, DB 116. *The court considers this opinion unsupported conjecture by Baldus.*

D. Conclusions of Law

Based upon the legal premises and authorities set out above the court makes these conclusions of law.

[25] The petitioner's statistics do not demonstrate a prima facie case in support of the contention that the death penalty was imposed upon him because of his race, because of the race of the victim, or because of any Eighth Amendment concern. Except for analyses conducted with the 230-variable model and the 250-variable model, none of the other models relied upon by the petitioner account to any substantial degree for racially neutral variables which could have produced the effect observed. The state-wide data does not indicate the likelihood of discriminatory treatment by the decision-makers who sought or imposed the death penalty and the Fulton County data does not produce any statistically significant evidence on a validated model nor any anecdotal evidence that race of the victim or race of the defendant played any part in the decision to seek or impose the death penalty on McCleskey.

The data base for the studies is substantially flawed, and the methodology utilized is incapable of showing the result of racial variables on cases similarly situated. Further, the methods employed are incapable of disclosing and do not disclose quantitatively the effect, if any, that the two suspect racial variables have either state-wide, county-wide or in McCleskey's case. Accordingly, a court would be incapable of discerning the degree of disparate treatment if there were any. Finally, the largest models utilized are insufficiently predictive to give adequate assurances that the presence of an effect by the two racial variables is real.

Even if it were assumed that McCleskey had made out a prima facie case, the respondent has shown that the results are not the product of good statistical methodology and, further, the respondent has rebutted any prima facie case by showing the existence of another explanation for the observed results, i.e., that white victim cases are acting as proxies for aggravated cases and that black victim cases are acting as proxies for mitigated cases. Further rebuttal is offered by the respondent in its showing that the black-victim cases being left behind at the life sentence and voluntary manslaughter stages, are less aggravated and more mitigated than the white-victim cases disposed of in similar fashion.

Further, the petitioner has failed to carry his ultimate burden of persuasion. Even in the state-wide data, there is no consistent statistically significant evidence that the death penalty is being imposed because of the race of the defendant. A persistent race of the victim effect is reported in the state-wide data on the basis of experiments performed utilizing models which do not adequately account for other neutral variables. These tables demonstrate nothing. When the 230-variable model is utilized, a race of the victim and race of the defendant effect is demonstrated. When all of the decisions made throughout the process are taken into account it is theorized but not demonstrated that the point in the system at which these impermissible considerations come into play is at plea bargaining. The study, however, is not geared to, nor does it attempt to control for other neutral variables to demonstrate that there is unfairness in plea bargaining with black defendants or killers of white victims. In any event, the petitioner's study demonstrates that at the two levels of the system that matter to him, the decision to seek the

death penalty and the decision to impose the death penalty, there is no statistically significant evidence produced by a reasonably comprehensive model that prosecutors are seeking the death penalty or juries are imposing the death penalty because the defendant is black or the victim is white. Further, the petitioner concedes that his study is incapable of demonstrating that he, specifically, was singled out for the death penalty because of the race of either himself or his victim. Further, his experts have testified that neither racial variable preponderates in the decision-making and, in the final analysis, that the seeking or the imposition of the death penalty depends on the presence of neutral aggravating and mitigating circumstances. For this additional reason, the court finds that even accepting petitioner's data at face value, he has failed to demonstrate that racial considerations caused him to receive the death penalty.

For these, among other, reasons the court denies the petition for a writ of habeas corpus on this issue.

III. CLAIM "A"—THE GIGLIO CLAIM.

Petitioner asserts that the failure of the State to disclose an "understanding" with one of its key witnesses regarding pending criminal charges violated petitioner's due process rights. In *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1971) the Supreme Court stated:

> As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112 [55 S.Ct. 340, 341, 79 L.Ed. 791] (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213 [63 S.Ct. 177, 87 L.Ed. 214] (1942). In *Napue v. Illinois*, 360 U.S. 264 [79 S.Ct. 1173, 3 L.Ed.2d 1217] (1959), we said, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.*, at 269 [79 S.Ct. at 1177]. Thereafter *Brady v. Maryland*, 373 U.S. [83], at 87 [83 S.Ct. at 1194, 10 L.Ed.2d 215], held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." *See* American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function § 3.11(a). When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule. 405 U.S. 150, 153-54, 92 S.Ct. 763, 765-66, 31 L.Ed.2d 104.

In *Giglio* an Assistant United States Attorney had promised leniency to a co-conspirator in exchange for his testimony against defendant. However, the Assistant U.S. Attorney who handled the case at trial was unaware of this promise of leniency and argued to the jury that the witness had "received no promises that he would not be indicted." The Supreme Court held that neither the Assistant's lack of authority nor his failure to inform his superiors and associates was controlling. The prosecution's duty to present all material evidence to the jury was not fulfilled and thus constituted a violation of due process requiring a new trial. *Id.* at 150, 92 S.Ct. at 763.

[26] It is clear from *Giglio* and subsequent cases that the rule announced in *Giglio* applies not only to traditional deals made by the prosecutor in exchange for testimony but also to any promises or understandings made by any member of the prosecutorial team, which includes police investigators. *See United States v. Antone*, 603 F.2d 566, 569 (5th Cir.1979) (*Giglio* analysis held to apply to understanding between investigators of the Florida Department of Criminal Law Enforcement and the witness in a federal prosecution). The reason for giving *Giglio* such a broad reach is that the *Giglio* rule is designed to do more than simply prevent prosecutorial misconduct. It is also a rule designed to insure the integrity of the truth-seeking process. As the Fifth Circuit stated in *United States v. Cowley*, 482 F.2d 702 (5th Cir.1973), "[w]e read *Giglio*

and [*United States v.*] *Tashman and Goldberg* (sic) [478 F.2d 129 (5th Cir., 1973)] to mean simply that the jury must be apprised of any promise which induces a key government witness to testify on the government's behalf." *Id.* at 707. More recently, the Eleventh Circuit has stated:

> The thrust of *Giglio* and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury. We must focus on "the impact on the jury." *Smith v. Kemp*, 715 F.2d 1459, 1467 (11th Cir.1983) (quoting *United States v. Anderson*, 574 F.2d 1347, 1356 (5th Cir.1978)).

In the present case the State introduced at petitioner's trial highly damaging testimony by Offie Gene Evans, an inmate of Fulton County Jail, who had been placed in solitary confinement in a cell adjoining petitioner's. Although it was revealed at trial that the witness had been charged with escaping from a federal halfway house, the witness denied that any deals or promises had been made concerning those charges in exchange for his testimony.[16] The jury was clearly left with the impression that Evans was unconcerned about any charges which were pending against him and that no promises had been made which would affect his credibility. However, at petitioner's state habeas corpus hearing Evans testified that one of the detectives investigating the case had promised to speak to federal authorities on his behalf.[17] It was further revealed that the escape charges pending against Evans were dropped subsequent to McCleskey's trial.

[27] After hearing the testimony, the habeas court concluded that the mere *ex parte* recommendation by the detective did not trigger the applicability of *Giglio*. This, however, is error under *United States v. Antone*, 603 F.2d 566, 569 (5th Cir.1979) and cases cited therein. A promise, made prior to a witness's testimony, that the investigating detective will speak

16. On direct examination the prosecutor asked:
Q. Mr. Evans have I promised you anything for testifying today?
A. No, sir, you ain't.
Q. You do have an escape charge still pending, is that correct?
A. Yes, sir. I've got one, but really it ain't no escape, what the peoples out there tell me, because something went wrong out there so I just went home. I stayed at home and when I called the man and told him that I would be a little late coming in, he placed me on escape charge and told me there wasn't no use of me coming back, and I just stayed on at home and he come and picked me up.
Q. Are you hoping that perhaps you won't be prosecuted for that escape?
A. Yeah, I hope I don't, but I don't—what they tell me, they ain't going to charge me with escape no way.
Q. Have you asked me to try to fix it so you wouldn't get charged with escape?
A. No, sir.
Q. Have I told you I would try to fix it for you?
A. No, sir.
Trial Transcript at 868.
On cross-examination by petitioner's trial counsel Mr. Evans testified:
Q. Okay. Now, were you attempting to get your escape charges altered or at least worked out, were you expecting your testimony to be helpful in that?
A. I wasn't worrying about the escape charge. I wouldn't have needed this for that charge, there wasn't no escape charge.
Q. Those charges are still pending against you, aren't they?
A. Yeah, the charge is pending against me, but I ain't been before no Grand Jury or nothing like that, not yet.
Trial Transcript at 882.

17. At the habeas hearing the following transpired:
The Court: Mr. Evans let me ask you a question. At the time that you testified in Mr. McCleskey's trial had you been promised anything in exchange for your testimony?
The Witness: No, I wasn't. I wasn't promised nothing about—I wasn't promised nothing by the D.A. But the Detective told me that he would—he said he was going to do a Notice[?] speak a word for me. That was what the Detective told me.
By Mr. Stroup:
Q. The Detective told you that he would speak a word for you?
A. Yeah.
Q. That was Detective [illegible]?
A. Yeah.
Habeas Transcript at 122.

favorably to federal authorities concerning pending federal charges is within the scope of *Giglio* because it is the sort of promise of favorable treatment which could induce a witness to testify falsely on behalf of the government. Such a promise of favorable treatment could affect the credibility of the witness in the eyes of the jury. As the court observed in *United States v. Barham*, 595 F.2d 231 (5th Cir.1979), *cert. denied*, 450 U.S. 1002, 101 S.Ct. 1711, 68 L.Ed.2d 205, the defendant is "entitled to a jury that, before deciding which story to credit, was truthfully apprised of any possible interest of *any* Government witness in testifying falsely." *Id.* at 243 (emphasis in original).

A finding that the prosecution has given the witness an undisclosed promise of favorable treatment does not necessarily warrant a new trial, however. As the Court observed in *Giglio*:

> We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . ." *United States v. Keogh*, 391 F.2d 138, 148 (C.A. 2 1968). A finding of materiality of the evidence is required under *Brady*, *supra*, at 87. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . ." 405 U.S. at 154, 92 S.Ct. at 766.

In *United States v. Anderson*, 574 F.2d 1347 (5th Cir.1978), the court elaborated upon the standard of review to be applied in cases involving suppression of evidence impeaching a prosecution witness:

> The reviewing court must focus on the impact on the jury. A new trial is necessary when there is any reasonable likelihood that disclosure of the truth would have affected the judgment of the jury, that is, when there is a reasonable likelihood its verdict might have been different. We must assess both the weight of the independent evidence of guilt and the importance of the witness' testimony, which credibility affects. *Id.* at 1356.

In other cases the court has examined the extent to which other impeaching evidence was presented to the jury to determine whether or not the suppressed information would have made a difference. *E.g., United States v. Antone*, 603 F.2d 566 (5th Cir.1979).

In the present case the testimony of Evans was damaging to petitioner in several respects. First, he alone of all the witnesses for the prosecution testified that McCleskey had been wearing makeup on the day of the robbery. Such testimony obviously helped the jury resolve the contradictions between the descriptions given by witnesses after the crime and their in-court identifications of petitioner. Second, Evans was the only witness, other than the codefendant, Ben Wright, to testify that McCleskey had admitted to shooting Officer Schlatt. No murder weapon was ever recovered. No one saw the shooting. Aside from the damaging testimony of Wright and Evans that McCleskey had admitted the shooting, the evidence that McCleskey was the triggerman was entirely circumstantial. Finally, Evans' testimony was by far the most damaging testimony on the issue of malice.[18]

[28] In reviewing all of the evidence presented at trial, this court cannot con-

18. In his closing argument to the jury, the prosecutor developed the malice argument:

> He (McCleskey) could have gotten out of that back door just like the other three did, but he chose not to do that, he chose to go the other way, and just like Offie Evans says, it doesn't make any difference if there had been a dozen policemen, cor . . in there, he was going to shoot his way out. He didn't have to do that, he could have run out the side entrance, he could have given up, he could have concealed himself like he said he tried to do under one of the couches and just hid there. He could have done that and let them find him, here I am, peekaboo.
>
> He deliberately killed that officer on purpose. I can guess what his purpose was. I am sure you can guess what it was, too. He is going to be a big man and kill a police officer and get away with it. That is malice.

Trial Transcript at 974-75.

clude that had the jury known of the promise made by Detective Dorsey to Offie Evans, that there is any reasonable likelihood that the jury would have reached a different verdict on the charges of armed robbery. Evans's testimony was merely cumulative of substantial other testimony that McCleskey was present at the Dixie Furniture Store robbery. However, given the circumstantial nature of the evidence that McCleskey was the triggerman who killed Officer Schlatt and the damaging nature of Evans's testimony as to this issue and the issue of malice, the court does find that the jury may reasonably have reached a different verdict on the charge of malice murder had the promise of favorable treatment been disclosed. The court's conclusion in this respect is bolstered by the fact that the trial judge, in charging the jury as to murder, instructed the jury that they could find the defendant guilty of either malice murder or felony murder. After approximately two hours of deliberation, the jury asked the court for further instructions on the definition of malice. Given the highly damaging nature of Evans's testimony on the issue of malice, there is a reasonable likelihood that disclosure of the promise of favorable treatment to Evans would have affected the judgment of the jury on this issue.[19]

As the Fifth Circuit observed in *United States v. Barham*, 595 F.2d 231 (5th Cir.), cert. denied, 450 U.S. 1002, 101 S.Ct. 1711, 68 L.Ed.2d 205 (1981), another case involving circumstantial evidence bolstered by the testimony of a witness to whom an undisclosed promise of favorable treatment had been given:

> There is no doubt that the evidence in this case was sufficient to support a verdict of guilty. But the fact that we would sustain a conviction untainted by the false evidence is not the question. After all, we are not the body which, under the Constitution, is given the responsibility of deciding guilt or innocence. The jury is that body, and, again under the Constitution, the defendant is entitled to a jury that is not laboring under a Government-sanctioned false impression of material evidence when it decides the question of guilt or innocence with all its ramifications.

We reiterate that credibility was especially important in this case in which two sets of witnesses—all alleged participants in one or more stages of a criminal enterprise—presented irreconcilable stories. Burnham was entitled to a jury that, before deciding which story to credit, was truthfully apprised of any possible interest of *any* Government witness in testifying falsely. Knowledge of the Government's promises to Joey Shaver and Duane and Jerry Beech would have given the jury a concrete reason to believe that those three witnesses might have fabricated testimony in order to avoid prosecution themselves or minimize the adverse consequences of prosecution. And the subsequent failure of the Government to correct the false impression given by Shaver and the Beeches [illegible] jury consideration [illegible] another, more persuasive reason to doubt the[ir] testimony—the very fact that they had attempted to give the jury a false impression concerning promises from the Government. In this case, in which credibility was cast so heavily in the balance, we cannot conclude that the jury, had it been given a specific reason to discount

19. Although petitioner has not made this argument, the court notes in passing that Evans's testimony at trial regarding the circumstances of his escape varies markedly from the facts appearing in the records of federal prison authorities. For example, the records show that Evans had been using cocaine and opium immediately prior to and during his absence from the halfway house. Petitioner's Exhibit D, filed June 25, 1982. Also, prison records show that upon being captured Evans told authorities he had been in Florida working undercover on a drug investigation. Petitioner's Exhibit [illegible], June 25, 1982. These facts available to the [illegible] could not amount to the defense [illegible] Evans's handling of his escape. See Note 1, supra. The prosecution allowed Evans's false statement to go uncorrected and the jury [illegible] a false impression of his credibility. Under these circumstances the [illegible] on the prosecution [illegible] Maryland, 373 U.S. 83, 87 [illegible] 10 L.Ed.2d 215 (1963). See also [illegible] 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

the testimony of these key Government witnesses, would still have found that the Government's case and Barham's guilt had been established beyond a reasonable doubt. *Id.* at 242–43 (emphasis in original).

Because disclosure of the promise of favorable treatment and correction of the other falsehoods in Evans' testimony could reasonably have affected the jury's verdict on the charge of malice murder, petitioner's conviction and sentence on that charge are unconstitutional.[20] The writ of habeas corpus must therefore issue.

IV CLAIM "C"—THE *SANDSTROM* CLAIM.

Petitioner claims that the trial court's instructions to the jury deprived him of due process because they unconstitutionally relieved the prosecution of its burden of proving beyond a reasonable doubt each and every essential element of the crimes for which defendant was convicted. Specifically, petitioner objects to that portion of the trial court's charge which stated:

> One section of our law says that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted.[21] Trial Transcript at 996.

[29, 30] It is now well established that the due process clause "protects the accused against conviction except upon proof

20. Nothing the court says in this part of the opinion is meant to imply that petitioner's confinement for consecutive life sentences on his armed robbery convictions is unconstitutional. The court holds only that the conviction and sentence for murder are unconstitutional.

21. The relevant portions of the trial court's jury instructions are set forth below. The portions to which petitioner objects are underlined.

> Now, the defendant enters upon the trial of this case, of all three charges set forth in the indictment, with the presumption of innocence in his behalf, and that presumption remains with him throughout the trial of the case unless and until the State introduces evidence proving the defendant's guilt of one or more or all of the charges beyond a reasonable doubt.
>
> The burden rests upon the state to prove the case by proving the material allegations of each count to your satisfaction and beyond a reasonable doubt. In determining whether or not the state has carried that burden you would consider all the evidence that has been introduced here before you during the trial of this case.
>
> Now, in every criminal prosecution, ladies and gentlemen, criminal intent is a necessary and material ingredient thereof. To put it differently, a criminal intent is a material and necessary ingredient in any criminal prosecution.
>
> I will now try to explain what the law means by criminal intent by reading you two sections of the criminal code dealing with intent and I will tell you how the last section applies to you, the jury.
>
> One section of our law says that the acts of a person of sound mind and discretion are presumed to be the product of the person's will and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted.
>
> I charge you, however, that a person will not be presumed to act with criminal intention, but the second code section says that the trier of facts may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.
>
> Now, that second code section I have read you as the term the trier of facts. In this case, ladies and gentlemen, you are the trier of facts, and therefore it is for you, the jury, to determine the question of facts solely from your determination as to whether there was a criminal intention on the part of the defendant, considering the facts and circumstances as disclosed by the evidence and deductions which might reasonably be drawn from those facts and circumstances.
>
> Now, the offense charged in Count One of the indictment is murder, and I will charge you what the law says about murder.
>
> I charge you that a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. That is the language of the law, ladies and gentlemen

beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Jury instructions which relieve the prosecution of this burden or which shift to the accused the burden of persuasion on one or more elements of the crime are unconstitutional. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

[31] In analyzing a *Sandstrom* claim the court must first examine the crime for which the petitioner has been convicted and then examine the complained-of charge to determine whether the charge unconstitutionally shifted the burden of proof on any essential element of the crime. *See Lamb v. Jernigan*, 683 F.2d 1332, 1335–36 (11th Cir.1982), *cert. denied*, — U.S. —, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983). If the reviewing court determines that a reasonable juror would have understood the instruction either to relieve the prosecution of its burden of proof on an essential element of the crime or shift to the defendant the burden of persuasion on that element the conviction must be set aside unless the reviewing court can state that the error was harmless beyond a reasonable doubt. *Lamb v. Jernigan*, *supra*; *Mason v. Balkcom*, 669 F.2d 222 (5th Cir. Unit B 1982), *cert. denied*, — U.S. —, 103 S.Ct. 1260, 75 L.Ed.2d 487 (1983).[22]

[32–34] Petitioner was convicted of armed robbery and malice murder. The offense of armed robbery under Georgia law contains three elements: (1) A taking of property from the person or the immediate presence of a person, (2) by use of an offensive weapon, (3) with intent to commit theft.[23] The offense of murder also contains three essential elements: (1) A homicide, (2) malice aforethought, and (3) unlawfulness.[24] *See Lamb v. Jernigan*, su-

> I charge you that legal malice is not necessarily ill-will or hatred. It is the intention to unlawfully kill a human being without justification or mitigation, which intention, however, must exist at the time of the killing as alleged, but it is not necessary for that intention to have existed for any length of time before the killing.
>
> In legal contemplation a man may form the intention to kill a human being, do the killing instantly thereafter, and regret the deed as soon as it is done. In other words, murder is the intentional killing of a human being without justification or mitigation.
>
> Trial Transcript, 988, 906–97, 908–99.

22. Whether a *Sandstrom* error can be held to be harmless remains an open question at this time. The Supreme Court expressly left open in *Sandstrom* the question of whether a burden-shifting jury instruction could ever be considered harmless. 442 U.S. at 526–27, 99 S.Ct. at 2460–61. The courts of this circuit have held that where the *Sandstrom* error is harmless beyond a reasonable doubt a reversal of the conviction is not warranted. *See, e.g., Lamb v. Jernigan*, 683 F.2d 1332, 1342–43 (11th Cir.1982). In *Connecticut v. Johnson*, — U.S. —, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983), the Supreme Court granted certiorari to resolve the question of whether a *Sandstrom* error could ever be considered harmless. Four Justices specifically held that the test of harmlessness employed by this circuit—whether the evidence of guilt was so overwhelming that the erroneous instruction could not have contributed to the jury's verdict—was inappropriate. *Id.* 103 S.Ct. at 977. However, an equal number of justices dissented from this holding. *Id.* at 979 (Powell, J., joined by Burger, C.J., Rehnquist and O'Connor, JJ., dissenting). The tie breaking vote was cast by Justice Stevens who concurred in the judgment on jurisdictional grounds. *Id.* at 978 (Stevens, J., concurring in the judgment).

Because a majority of the Supreme Court had not declared the harmless error standard employed in this circuit to be erroneous, the Eleventh Circuit has continued to hold that *Sandstrom* errors may be analyzed for harmlessness. *See Spencer v. Zant*, 715 F.2d 1562 (11th Cir.1983).

23. Georgia Code Ann. § 26–1902 (now codified at O.C.G.A. § 16–8–41) provides in pertinent part:

> (a) A person commits armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon.

24. Georgia Code Ann. § 26–1101 (now codified at O.C.G.A. § 16–5–1) defines the offense of murder as follows:

> (a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.
>
> (b) Express malice is that deliberate intention unlawfully to take away the life of a fellow

pra; *Holloway v. McElroy*, 632 F.2d 605, 628 (5th Cir.1980), *cert. denied*, 451 U.S. 1028, 101 S.Ct. 3019, 69 L.Ed.2d 398 (1981). The malice element, which distinguishes murder from the lesser offense of voluntary manslaughter, means simply the intent to kill in the absence of provocation. In *Lamb v. Jernigan* the court concluded that "malice, including both the intent component and the lack of provocation or justification, is an essential element of murder under Ga.Code Ann. § 26-1101(a) that *Mullaney* and its progeny require the State to prove beyond a reasonable doubt." 683 F.2d at 1337. Since the intent to commit theft is an essential element of the offense of armed robbery, the State must also prove this element beyond a reasonable doubt.

In analyzing the jury instructions challenged in the present case to determine whether they unconstitutionally shift the burden of proof on the element of intent, the court has searched for prior decisions in this circuit analyzing similar language. These decisions, however, provide little guidance for they reach apparently opposite results on virtually identical language. In *Sandstrom* the Supreme Court invalidated a charge which stated that "[t]he law presumes that a person intends the ordinary consequences of his acts." 442 U.S. at 513, 99 S.Ct. at 2453. The Court held that the jury could have construed this instruction as either creating a conclusive presumption of intent once certain subsidiary facts had been found or shifting to the defendant the burden of persuasion on the element of intent. The Court held both such effects unconstitutional. Like the instruction in *Sandstrom*, the instruction at issue in the present case stated that "the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted." This presumption would appear on its face to shift the burden of persuasion to the defendant. It does not contain the permissive language (intent "*may* be presumed when it would be the natural and necessary consequence of the particular acts.") which the *Lamb* court ruled created only a permissive inference rather than a mandatory presumption. Rather, the instruction at issue here states that a person is presumed to intend the natural and probable consequences of his acts. On its face this instruction directs the jury to presume intent unless the defendant rebuts it. This would appear to be the sort of burden-shifting instruction condemned by *Sandstrom*. This conclusion is supported by *Franklin v. Francis*, 720 F.2d 1206 (11th Cir.1983) which held that language virtually identical to that involved in the present case [25] violated *Sandstrom*. In that case the court declared:

> This is a mandatory rebuttable presumption, as described in *Sandstrom*, since a reasonable juror could conclude that on finding the basic facts (sound mind and discretion) he must find the ultimate fact (intent) for the natural consequences of an act to occur unless the defendant has proven the contrary by an undefined quantum of proof which may be more than "some" evidence. 720 F.2d at 1210.

However, in *Tucker v. Francis*, 720 F.2d 1504 (11th Cir.1984) another panel of the Eleventh Circuit, including the author of the *Franklin* opinion, reviewed language identical to that in *Franklin* and concluded that it created no more than a permissive inference and did not violate *Sandstrom*. The court in *Tucker* relied upon the fact

> [t]hat acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted.
>
> *Franklin v. Francis*, 720 F.2d at 1210.

creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

25. In *Franklin* the trial court charged the jury that

that the trial judge instructed the jury in other parts of his charge that criminal intent was an essential element of the crime and was a fact to be determined by the jury. The court also focused on the fact that the charge also stated that "a person will not be presumed to act with criminal intention, but the trier of fact, that is you the jury, may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.", *Tucker, supra*, at 1517. Examining the objectionable language in the context of the entire instruction under *Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973), the court concluded that the instruction would not unconstitutionally mislead the jury as to the prosecution's burden of proof. *Tucker, supra*, at 1517. The problem with this reasoning is that the exact same instructions were contained in the charge given to the jury in *Franklin v. Francis*. *See Franklin v. Francis*, 720 F.2d at 1208 n. 2. This court can find no principled way of distinguishing between the charges at issue in *Franklin* and in *Tucker* and can discern no reason why the charge in *Franklin* would create a mandatory rebuttable presumption while the charge in *Tucker* would create only a permissive inference. The *Tucker* court did not explain this inconsistency and in fact did not even mention *Franklin*.

[35] The charge at issue in the present case is virtually identical to those involved in *Franklin* and in *Tucker*. This court is bound to follow *Tucker v. Francis*, which is the latest expression of opinion on this subject by this circuit. The court holds that the instruction complained of in this case, taken in the context of the entire charge to the jury, created only a permissive inference that the jury could find intent based upon all the facts and circumstances of the case and thus did not violate *Sandstrom*. *Tucker v. Francis, supra*.

[36] Having held that the instruction was not unconstitutional under *Sandstrom*, there is no need to examine the issue of harmlessness. However, the court expressly finds that even if the challenged instructions violated *Sandstrom*, the error was harmless beyond a reasonable doubt. The jury had overwhelming evidence that petitioner was present at the robbery and that he was the only one of the robbers in the part of the store from which the shots were fired. The jury also had evidence that he alone of the robbers was carrying the type of weapon that killed Officer Schlatt. Finally, the jury had the testimony of Ben Wright and Offie Evans that McCleskey had not only admitted killing Officer Schlatt but had even boasted of his act. Looking at the totality of the evidence presented and laying aside questions of credibility which are the proper province of the jury, this court cannot conclude that there is any reasonable likelihood that the intent instruction, even if erroneous, contributed to the jury's decision to convict petitioner of malice murder and armed robbery. Petitioner's *Sandstrom* claim is therefore without merit.

V CLAIM "L"—PROSECUTORIAL MISCONDUCT AT THE SENTENCING PHASE.

[37] In this claim petitioner argues that the Assistant District Attorney improperly referred to the appellate process during his arguments to the jury at the sentencing phase of petitioner's trial.[36] Reference to

36. The relevant portion of the prosecutor's argument to the jury in favor of the death penalty is set forth below:

> Now, what should you consider as you are deliberating the second time here, and I don't know what you are going to consider.
>
> I would ask you, however, to consider several things. Have you observed any remorse being exhibited during this trial by Mr. McCleskey? Have you observed any remorse exhibited while he was testifying?
>
> Have you observed any remorse by Mr. McCleskey either visually as you look at him now or during the trial or during the time that he testified? Has he exhibited to you any sorrow, both visually or during the time that he was testifying?
>
> Have you seen any tears in his eyes for this act that he has done?
>
> I would also ask you to consider the prior convictions that you have had before the jury, and particularly the one where

the appellate process are not *per se* unconstitutional unless on the record as a whole it can be said that it rendered the entire trial fundamentally unfair. *McCorquodale v. Balkcom*, 705 F.2d 1553, 1556 (11th Cir. 1983); *Corn v. Zant*, 708 F.2d 549, 557 (11th Cir.1983).

[38] The prosecutor's arguments in this case did not intimate to the jury that a death sentence could be reviewed or set aside on appeal. Rather, the prosecutor's argument referred to petitioner's prior criminal record and the sentences he had received. The court cannot find that such arguments had the effect of diminishing the jury's sense of responsibility for its deliberations on petitioner's sentence. Insofar as petitioner claims that the prosecutor's arguments were impermissible because they had such an effect, the claim is without merit.[37]

> *got three convictions. I believe if you look at those papers carefully you are going to find, I think, on one of those he got three life sentences to begin with, and then there is a cover sheet, where apparently that was reduced to what, eighteen years or fifteen years or something, which means of course, he went through the appellate process and somehow got it reduced.*
>
> Now, I ask you to consider that in conjunction with the life that he has set for himself. You know, I haven't set his goals, you haven't set his goals, he set his own goals, and here is a man that served considerable periods of time in prison for armed robbery, just like Ben Wright said, you know, that is his profession and he gets in safely, takes care of the victims, although he may threaten them, and gets out safely, that is what he considers doing a good job, but of course you may not agree with him, but that is job safety.
>
> I don't know what the Health, Education and Welfare or whatever organization it is that checks on job safety would say, but that is what Mr. Ben Wright considers his responsibility.
>
> Now, apparently Mr. McCleskey does not consider that his responsibility, so consider that. The life that he has set for himself, the direction he has set his sails, and thinking down the road, are we going to have to have another trial sometime for another peace officer, another corrections officer, or some innocent bystander who happens to walk into a store, or some innocent person who happens to be working in the store who makes the wrong move, who makes the wrong turn, that makes the wrong gesture, that moves suddenly and ends up with a bullet in their head?
>
> This has not been a pleasant task for me, and I am sure it hasn't been a pleasant task for you. I would have preferred that some of the other Assistants downstairs be trying this case. I would prefer some of the others be right here now instead of me, and I figure a lot of you are figuring why did I get on this jury, why not some of the other jurors, let them make the decision.
>
> I don't know why you are here, but you are here and I have to be here. It has been unpleasant for me, but that is my duty. I have tried to do it honorably and I have tried to do it with justice. I have no personal animosity toward Mr. McCleskey. I have no words with him, I don't intend to have any words with him, but I intend to follow what I consider to be my duty, my honor and justice in this case and I ask you to do the same thing, that you sentence him to die, and that you find aggravating circumstances, both of them, in this case.
>
> Transcript at 1019-21.

37. Although the point has not been argued by either side and is thus not properly before the court, the prosecutor's arguments may have been impermissible on the grounds that they encouraged the jury to take into account the possibility that petitioner would kill again if given a life sentence. Such "future victims" arguments have recently been condemned by the Eleventh Circuit on the grounds that they encourage the jury to impose a sentence of death for improper or irrelevant reasons. *See Tucker v. Francis*, 723 F.2d 1504 (11th Cir.1984); *Brooks v. Francis*, 716 F.2d 780 (11th Cir.1983); *Hance v. Zant*, 696 F.2d 940 (11th Cir.1982). The court makes no intimation about the merits of such an argument and makes mention of it only for the purpose of pointing out that it has not been raised by fully competent counsel.

VI. CLAIM "B"—TRIAL COURT'S REFUSAL TO PROVIDE PETITIONER WITH FUNDS TO RETAIN HIS OWN EXPERT WITNESS.

Petitioner contends that the trial court's refusal to grant funds for the employment of a ballistics expert to impeach the testimony of Kelley Fite, the State's ballistics expert, denied him due process. This claim is clearly without merit for the reasons provided in *Moore v. Zant*, 722 F.2d 640 (11th Cir.1983).

[39, 40] Under Georgia law the appointment of an expert in a case such as this

ordinarily lies within the discretion of the trial court. *See Whitaker v. State*, 246 Ga. 163, 269 S.E.2d 436 (1980). In this case the State presented an expert witness to present ballistics evidence that the bullet which killed Officer Schlatt was probably fired from a gun matching the description of the gun petitioner had stolen in an earlier robbery and which matched the description of the gun several witnesses testified the petitioner was carrying on the day of the robbery at the Dixie Furniture Company. Petitioner had ample opportunity to examine the evidence prior to trial and to subject the expert to a thorough cross-examination. Nothing in the record indicates that the expert was biased or incompetent. This court cannot conclude therefore that the trial court abused its discretion in denying petitioner funds for an additional ballistics expert.

VII. CLAIM "D"—TRIAL COURT'S INSTRUCTIONS REGARDING USE OF EVIDENCE OF OTHER CRIMES AT GUILT STAGE OF PETITIONER'S TRIAL.

Petitioner claims that the trial court's instructions regarding the purposes for which the jury could examine evidence that petitioner had participated in other robberies for which he had not been indicted was overly broad and diminished the reliability of the jury's guilt determination.

[41, 42] During the trial the prosecution introduced evidence that petitioner had participated in armed robberies of the Red Dot Grocery Store and the Red Dot Fruit Stand. At that time the trial judge cautioned the jury that the evidence was admitted for the limited purpose of "aiding in the identification and illustrating the state of mind, plan, motive, intent and scheme of the accused, if in fact it does to the jury so do that." The evidence tended to establish that petitioner had participated in earlier armed robberies employing the same modus operandi and that in one of these robberies he had stolen what was alleged to have been the weapon that killed Officer Schlatt. Such evidence is admissible under Georgia law. *See Hamilton v. State*, 239 Ga. 72, 235 S.E.2d 515 (1977). Petitioner objects that the trial court's instructions regarding the use of this evidence were overbroad because "(a) the prosecution itself had offered the evidence of other transactions for the purpose of showing the identity of the accused rather than to show intent or state of mind, and (b) it is irrational to instruct that evidence of an accused's participation in another transaction where a murder did not occur is probative of the accused's intent to commit malice murder." Petitioner's Memorandum of Law in Support of Issuance of the Writ at 10–11. Both of these contentions are without merit. First, the court sees nothing in the court's instructions to support petitioner's contention that the jury was allowed to find intent to commit malice murder from the evidence of the prior crimes. Petitioner was charged with armed robbery and murder. The evidence of the Red Dot Grocery Store robbery was admissible for the purpose of showing that petitioner had stolen the murder weapon. The evidence of the other armed robberies was admissible for the purpose of showing a common scheme or plan on the armed robbery count. Also, the evidence of the Red Dot Fruit Stand robbery was admitted for impeachment purposes only after the petitioner took the stand in his own defense. The court has read the trial court's instructions and cannot conclude that the instructions were overbroad or denied petitioner a fair trial. *See Spencer v. Texas*, 385 U.S. 554, 560–61, 87 S.Ct. 648, 651–52, 17 L.Ed.2d 606 (1967).[28]

28. The relevant portion of the trial judge's instructions to the jury were as follows:

> Now, ladies and gentlemen, there was certain evidence that was introduced here and I told you it was introduced for a limited purpose and I will repeat the cautionary charge I gave you at that time:
>
> I told you that in the prosecution of a particular crime, evidence which in any manner tends to show that the accused has committed another transaction, wholly distinct, independent and separate from that for which he is on trial, even though it may show a transaction of the same nature, with similar methods

VIII. CLAIM "E"—EVIDENCE OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES PRESENTED AT PENALTY STAGE OF PETITIONER'S TRIAL.

[43] Petitioner contends that the trial court erred by giving the jury complete, unlimited discretion to use any of the evidence presented at the trial during its deliberations regarding imposition of the death penalty. Petitioner's claim is without merit. The trial judge specifically instructed the jury that it could not impose the death penalty unless it found at least one statutory aggravating circumstance.[29] He also instructed the jury that if it found one or more statutory aggravating circumstances it could also consider any other mitigating or aggravating circumstances in determining whether or not the death penalty should be imposed.

Georgia's capital sentencing procedure has been declared constitutional by the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Just recently the Supreme Court examined an argument similar to the one petitioner makes here in *Zant v. Stephens*, — U.S. —, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). In that case the Court dealt with the argument that allowing the jury to consider any aggravating circumstances once a statutory aggravating circumstance had been found allowed the jury unbridled discretion in determining whether or not to impose the death penalty on a certain class of defendants. The Court stated:

> Our cases indicate, then, that statutory aggravating circumstances play a consti-

and in the same localities, it is admitted into evidence for the limited purpose of aiding in identification and illustrating the state of mind, plan, motive, intent and scheme of the accused, if, in fact, it does to the jury so do that.

Now, whether or not this defendant was involved in such similar transaction or transactions is a matter for you to determine. Furthermore, if you conclude that the defendant was involved in this transaction or these transactions, you should consider it solely with reference to the mental state of the defendant insofar as it is applicable to the charges set forth in the indictment, and the court in charging you this principle of law in no way intimates whether such transaction or transactions, if any, tend to illustrate the state of mind or intent of the defendant or aids in identification, that is a matter for you to determine.

Transcript at 990-91.

29. The relevant portion of the judge's sentencing charge is printed below. The challenged portion is underlined.

> I charge you that in arriving at your determination you must first determine whether at the time the crime was committed either of the following aggravating circumstances was present and existed beyond a reasonable doubt, one, that the offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit, armed robbery, and two, the offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
>
> Now, if you find one or both of these aggravating circumstances existed beyond a reasonable doubt, upon consideration of the offense of murder, then you would be authorized to consider imposing a sentence of death relative to that offense.
>
> If you do not find beyond a reasonable doubt that one of the two of these aggravating circumstances existed with reference to the offense of murder, then you would not be authorized to consider the penalty of death, and in that event the penalty imposed would be imprisonment for life as provided by law.
>
> In arriving at your determination of which penalty shall be imposed, you are authorized to consider all of the evidence received in court presented by the State and the defendant throughout the trial before you.
>
> You should consider the facts and circumstances in mitigation. Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame.
>
> Now, it is not mandatory that you impose the death penalty even if you should find one of the aggravating circumstances does exist or did exist. You could only impose the death penalty if you do find one of the two statutory aggravating circumstances I have submitted to you, but if you find one to exist or both of them to exist, it is not mandatory upon you to impose the death penalty.

Transcript, 1027-29.

tutionally necessary function at the stage of legislative definition: They circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime. *Zant v. Stephens*, — U.S. —, 103 S.Ct. at 2743-44 [77 L.Ed.2d 235] (emphasis in original).

The court specifically approved in *Zant v. Stephens* consideration by the jury of non-statutory aggravating circumstances, provided that such evidence is not "constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion or political affiliation of the defendant." *Id.* 103 S.Ct. at 2747.

The sentencing jury in this case found two statutory aggravating circumstances: (1) That the offense of murder had been committed while McCleskey was engaged in the commission of another capital felony; and (2) that the offense of murder was committed against a peace officer while engaged in the performance of his official duties. "The trial judge could therefore properly admit any additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior conviction. . . . provided that the evidence bore on 'defendant's prior record, or circumstances of his offense.'" *Moore v. Zant*, 722 F.2d 640 at 644 (11th Cir.1983) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 n. 12, 98 S.Ct. 2954, 2965 n. 12, 57 L.Ed.2d 973 (1978)). For the reasons stated in *Zant v. Stephens*, *supra*, and *Moore v. Zant*, *supra*, petitioner's claim is without merit.

IX. CLAIM "F"—WHETHER THE ADMISSION AT PETITIONER'S TRIAL OF EVIDENCE CONCERNING PRIOR CRIMES AND CONVICTIONS VIOLATED PETITIONER'S DUE PROCESS RIGHTS.

Petitioner contends that the admission of evidence concerning two prior armed robberies for which he had not been indicted and the admission of details of other prior armed robberies for which he had been convicted violated his due process rights. This court has already concluded in Part VII, *supra*, that the evidence that petitioner participated in prior armed robberies was properly admitted to show petitioner's scheme, motive, intent or design and that the trial judge's instructions properly limited the use of this evidence. *See also McCleskey v. State*, 245 Ga. 108, 114, 263 S.E.2d 146 (1980). The evidence to which petitioner objects most strongly in Claim "F" concerns *details* of prior armed robberies for which petitioner had been convicted. When petitioner took the stand in his own defense, he admitted on direct examination that he had previously been convicted of armed robbery. He admitted to being guilty of those crimes, gave the dates of the convictions and the sentences he had received. On cross-examination the Assistant District Attorney asked petitioner a number of questions concerning the details of those robberies.[30] Petitioner contends that this questioning concerning the

30. A portion of the cross-examination was as follows:

Q. Are you saying you were guilty or you were not guilty?
A. Well, I was guilty on this.
Q. Three counts of armed robbery?
A. Pardon me?
Q. You were guilty for the three counts of armed robbery?
A. Yes sir.
Q. How about the other two that you pled guilty to, were you guilty of those?
A. I was guilty on the Cobb County, but the others I was not guilty of, but I pleaded guilty to them anyway, because like I say, I didn't see no reason to go through a long process of fighting them, and I already had a large sentence.
Q. So you are guilty for the Douglas County armed robberies and the Cobb County robbery, but not the Fulton County robbery?
A. I pleaded guilty to it.
Q. To the Fulton County?
A. Sure.

details of crimes to which petitioner had admitted guilt exceeded the bounds of what was permissible for impeachment purposes, was irrelevant to the crimes for which he was being tried, and served to prejudice the jury against him. The Supreme Court of Georgia has already declared that this evidence was properly admitted under the Georgia Rules of Evidence. Petitioner asks this court now to declare the Georgia rule allowing the admissibility of this evidence to be violative of the due process clause of the Fourteenth Amendment.

In *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), the Supreme Court stated:

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice of emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. *Id.* at 638, 100 S.Ct. at 2390.

Q: But are you guilty of that robbery?
A: I wasn't guilty of it, but I pleaded guilty to it.
Q: But you were guilty in all of the robberies in Cobb County and Douglas County, is that correct?
A: I have stated I am guilty for them, but for the ones in Fulton County, no, I wasn't guilty of it. I pleaded guilty to it because I didn't see no harm it could do to me.
Q: Now, one of those armed robberies in Douglas County, do you recall where that might have been?
A: You mean place?
Q: Yes, sir.
A: I know it was a loan company.
Q: Kennesaw Finance Company on Broad Street, is that about correct?
A: That sounds familiar.
Q: And did you go into that place of business at approximately closing time?
A: I would say yes.
Q: Did you tie the manager and the—the managers up?
A: No, I didn't do that.
Q: Did somebody tie them up?
A: Yes, sir.
Q: Did they curse those people?
A: Did they curse them?
Q: Yes, sir.
A: Not to my recollection.
Q: Did they threaten to kill those people?
A: Not to my recollection.
Q: Did somebody else threaten to kill them?
A: I don't remember anybody making any threats. I vaguely remember the incident, but I don't remember any threats being issued out.
Q: Now, the robbery in Cobb County, do you remember where that might have been.
A: Yes, sir, that was at Kennesaw Finance, I believe.
Q: And do you remember what time of day that robbery took place?
A: If I am not mistaken, I think it was on the 23rd day of July.
Q: 1970?
A: Right.
Q: About 4:30 p.m.?
A: Yes, sir.
Q: Were you found inside the store on the floor with a .32 caliber revolver?
A: Yes, sir, they caught me red-handed. I couldn't deny it.
Q: And did you arrive there with an automobile parked around the corner?
A: I didn't have an automobile.
Q: Did that belong to Harold McHenry?
A: McHenry had the automobile.
Q: And was he with you in the robbery?
A: Yes, sir.
Q: And was that automobile parked around the corner with the motor running?
A: At that time I don't know exactly where it was parked because I didn't get out right there around the corner, I got out of the street from the place and he was supposed to pick us up right there, but unfortunately he didn't make it.
Q: You also have been convicted out in De Kalb County, haven't you?
A: Yes, sir. I entered a plea out there. All of those charges stem from 1970.
Q: What did you plead guilty to out in De Kalb County?
A: Robbery charge.
Q: Armed robbery?
A: Yes, sir.
Q: And where was that at, sir?
A: I don't know—I don't remember exactly where the robbery was supposed to have took place, but I remember entering a guilty plea to it.
Q: Were you guilty of that?
A: No, sir, I wasn't guilty of it. Like I said I had spent money on top of money trying to fight these cases and I didn't see any need to continue to fight cases and try to win them and I have already got a large sentence anyway.
Q: I believe the DeKalb County case was out at the Dixie Finance Company out in Lithonia, is that correct?
A: I don't really recollect. I do remember the charge coming out, but I don't recall exactly what place it was.

Transcript 845–849.

In *Beck* the Supreme Court struck down an Alabama statute which prohibited a trial judge from instructing the jury in a murder case that it could find the defendant guilty of a lesser-included offense. The Court ruled that this statute distorted the factfinding function of the jury. "In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." *Id.* at 642, 100 S.Ct. at 2392.

In *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) the Supreme Court set aside a death sentence on the grounds that the state trial court had excluded certain hearsay testimony at the sentencing portion of petitioner's trial. In that case the Court stated:

> Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. *Id.* at 96, 99 S.Ct. at 2151.

[44] It seems clear from these cases that a state procedural or evidentiary rule which might substantially diminish the reliability of the factfinding function of the jury in a capital case would violate the due process clause of the Fourteenth Amendment. The question, then, is whether or not the admissibility of the details of other crimes can be said to have had the effect of diminishing "the reliability of the guilt determination." Petitioner has cited several cases from this and other circuits which have held that the admission in a federal prosecution of details of prior crimes to which the defendant had admitted guilt was unfairly prejudicial and constituted reversible error. *See, e.g., United States v. Tumblin*, 551 F.2d 1001 (5th Cir.1977); *United States v. Harding*, 525 F.2d 84 (7th Cir.1975) ("The rule that it is error to inquire about the details of prior criminal conduct is so well established that such error is cognizable despite the absence of any objection by defense counsel."). The point petitioner has overlooked is that prosecutions in federal court are governed by the Federal Rules of Evidence. Each of the cases petitioner has cited rely to a greater or lesser extent upon an interpretation of those rules. While the Federal Rules of Evidence embody a modern concept of fairness and due process, it is not for this court to say that they are the only embodiment of due process or the standard against which state rules of evidence must be judged. While the evidence presented at petitioner's trial would probably not have been admitted in a federal prosecution, this court cannot conclude that it was so seriously prejudicial that it undermined the reliability of the jury's guilt determination. Petitioner's Claim "F" is therefore without merit.

X. CLAIM "M"—THE SUGGESTIVE LINEUP.

[45] In this claim petitioner contends that he was shown to at least three witnesses for the State in an illegal and highly suggestive display immediately prior to his trial without the knowledge, consent, or presence of defense counsel. The Supreme Court of Georgia thoroughly addressed this concern and found against petitioner. *McCleskey v. State*, 245 Ga. 108, 110–12, 263 S.E.2d 146 (1980). In its discussion the Supreme Court of Georgia stated:

> The record shows that four witnesses immediately prior to the call of the case saw the appellant and four other persons sitting in the jury box guarded by deputy sheriffs. Each of these witnesses testified that they recognized the appellant as one of the robbers at the time they saw him seated in the jury box. There is no indication that the witnesses were asked to view the man seated in the jury box and see if they recognized anyone. No one pointed out the appellant as the defendant in the case, rather it is apparent from the witnesses' testimony that each recognized the appellant from having viewed him at the scene of the respective

robberies. Therefore, no illegal post-indictment lineup occurred. . . .

Appellant argues further that the four witnesses viewing him in the jury box as he awaited trial along with police identification procedures impermissibly tainted the witnesses' in-court identification of the appellant.

The threshold inquiry is whether the identification procedure was impermissibly suggestive. Only if it was, need the court consider the second question: Whether there was a substantial likelihood of irreparable misidentification. . . .

The chance viewing of the appellant prior to trial as he sat with others was no more suggestive than seeing him in the hall as he and other defendants are being brought in for trial, or seeing him seated at the defense table as each witness comes in to testify. We conclude that the chance viewing of the appellant immediately prior to trial by four of the State's witnesses was not impermissibly suggestive. Also we find the identifications were not tainted by police identification procedures. 245 Ga. at 110, 263 S.E.2d 146.

Although the court found that the display was not impermissibly suggestive, the court went on to examine whether the in-court identifications were reliable and found that they were. This court finds no basis in the record or in the arguments presented by petitioner for concluding that the Supreme Court of Georgia was in error. The court therefore finds that petitioner's Claim "M" is without merit.

XI. CLAIM "N"—WHETHER PETITIONER'S STATEMENT INTRODUCED AT TRIAL WAS FREELY AND VOLUNTARILY GIVEN AFTER A KNOWING WAIVER OF PETITIONER'S RIGHTS.

[46] In this claim petitioner contends that the admission at trial of his statements given to the police was error because the statements were not freely and voluntarily given after a knowing waiver of rights. Before the statement was revealed to the jury the trial court held, outside of the presence of the jury, a *Jackson v. Denno* hearing. The testimony at this hearing revealed that at the time he was arrested petitioner denied any knowledge of the Dixie Furniture Store robbery. He was detained overnight in the Marietta Jail. The next morning when two Atlanta police officers arrived to transfer him to Atlanta they advised him of his full *Miranda* rights. He again denied any knowledge of the Dixie Furniture Store robbery. There was some dispute about what was said during the half-hour trip back to Atlanta. Petitioner claimed that the officers told him that his co-defendants had implicated him and that if he did not start talking they would throw him out of the car. The officers, of course, denied making any such threat but did admit that they told petitioner that the other defendants were "trying to stick it on" him. The officers testified that during the trip back, after being fully advised of his *Miranda* rights and not being subjected to any coercion or threats, petitioner admitted his full participation in the robbery but denied that he shot Officer Schlatt.

Immediately upon arrival at the Atlanta Police Department petitioner was taken to Detective Jowers. At that time petitioner told Jowers that he was ready to talk. Detective Jowers had petitioner execute a written waiver of counsel. This waiver included full *Miranda* warnings and a statement that no threats or promises had been made to induce petitioner's signature. Petitioner's statement was then taken over the next several hours. During the first part of this session petitioner simply narrated a statement to a secretary who typed it. The secretary testified that petitioner was dissatisfied with the first draft of the statement and started another one. The first draft was thrown away.

After petitioner finished his narration Detective Jowers proceeded to ask him a number of questions about the crime. This questioning went on for some time off the record. Finally, a formal question and answer session was held on the record. These questions and answers were typed up by the secretary and signed by petitioner.

It is undisputed that the atmosphere in the room where the statement was being taken was unusually relaxed and congenial, considering the gravity of the crime of which petitioner was accused. The secretary who typed it testified that she had never seen the police officers treat a murder suspect with such warmth.[31]

After hearing all of the testimony and considering petitioner's argument that the police had engaged in a "Mutt and Jeff" routine,[32] the trial court ruled that the statement had been freely and voluntarily given after a knowing waiver of petitioner's *Miranda* rights. The jury was then returned and the statement and testimony were introduced.

After having read the transcript of the proceedings this court cannot conclude that the trial judge erred in his finding that the statement was freely and voluntarily given. There was no error, therefore, in admitting the statement into evidence. Petitioner's Claim "N" is therefore without merit.

31. The officers gave petitioner cigarettes, potato chips, and soft drinks during the interrogation. They also at one point discussed with him the attractiveness of a particular female officer.

32. Such routines involve one group of officers acting hostile and threatening toward the defendant while another officer or group of officers seemingly befriends him and showers him with kindness. The rationale for such routines is that defendants often believe they have found a friend on the police force to whom they can tell their story.

33. The examination of Miss Barbara J. Weston was as follows:

Q: Now, Miss Weston, are you conscientiously opposed to capital punishment?
A: Yes.
Q: Your opposition towards capital punishment, would that cause you to vote against it regardless of what the facts of the case might be?
A: Yes, I would say so, because of the doctrine of our church. We have a manual that we go by.
Q: Does your church doctrine oppose capital punishment?
A: Yes.
Q: So you would oppose the imposition of capital punishment regardless of what the facts would be?
A: Yes.
Q: You would not even consider that as one of the alternatives?
A: No, I wouldn't.
The Court: Mr. Turner, any questions you want to ask?
Mr. Turner: No questions from me.
The Court: Miss Weston, I will excuse you from this case.
Transcript 98–99

The testimony of Emma T. Cason was as follows:

Q: Mrs. Cason, are you conscientiously opposed to capital punishment?
A: Yes.
Q: You are?
A: Yes.
Q: If you had two alternatives in a case as far as penalties go, that is, impose the death sentence or life penalty, could you at least consider the imposition of the death penalty?
A: I don't think so, no. I would have to say no.
Q: Under any circumstances you would not consider it?
A: No.
Mr. Parker: Thank you.
The Court: Any questions?
Mr. Turner: No questions.
The Court: Mrs. Cason, I will excuse you and let you return to the jury assembly room on the fourth floor.
Transcript 129–30

XII. CLAIM "O"—EXCLUSION OF DEATH-SCRUPLED JURORS.

Petitioner claims that the exclusion of two prospective jurors because of their opposition to the death penalty violated his Sixth Amendment rights under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Both jurors indicated that they would not under any circumstances consider the death penalty.[33]

[47] In *Witherspoon v. Illinois*, *supra*, the Supreme Court held that a person could not be sentenced to death by a jury from which persons who had moral reservations about the death penalty had been excluded, unless those persons had indicated that their opposition to the death penalty would prevent them from fulfilling their oaths as jurors to apply the law:

> [N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would

automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*. 391 U.S. at 522-23 n. 21, 88 S.Ct. at 1776-77 n. 21 (emphasis in original).

Since the two prospective jurors in this case indicated that they would not under any circumstances vote for the death penalty, the trial court committed no error in excluding them. *See Boulden v. Holman*, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969).

[48] Petitioner's argument that the exclusion of death-scrupled jurors violated his right to be tried by a jury drawn from a representative cross section of his community has already been considered and rejected in this circuit. *Smith v. Balkcom*, 660 F.2d 573, 582-83 (5th Cir. Unit B 1981), *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982); *Spinkellink v. Wainwright*, 578 F.2d 582, 593-99 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796, *reh'g denied*, 441 U.S. 937, 99 S.Ct. 2064, 60 L.Ed.2d 667 (1979). The Court in *Spinkellink* also rejected petitioner's claims that the exclusion of death-scrupled jurors resulted in a prosecution-prone jury or a jury that was incapable of maintaining "a link between contemporary community values and the penal system." 578 F.2d at 593-99. *See generally, Woodson v. North Carolina*, 428 U.S. 280, 295, 96 S.Ct. 2978, 2987, 49 L.Ed.2d 944 (1976).

Because the two prospective jurors indicated they would not consider the death penalty under any circumstances, they were properly excluded, and petitioner's Claim "O" is without merit.

XIII. CLAIM "I"—PETITIONER'S CLAIM THAT THE DEATH PENALTY FAILS TO SERVE RATIONAL INTERESTS

In his petition for the writ petitioner raised a claim that the death penalty fails to serve rational interests. Neither petitioner nor the State has briefed this issue, but the premise appears to be that the supposed deterrent value of the death penalty cannot be demonstrated; that executions set socially-sanctioned examples of violence; that public sentiment for retribution is not so strong as to justify use of the death penalty; and that no penal purpose is served by execution which cannot be more effectively served by life imprisonment. Such arguments are more properly addressed to the political bodies. *See Furman v. Georgia*, 408 U.S. 238, 410, 92 S.Ct. 2726, 2814, 33 L.Ed.2d 346 (1972) (Blackmun, J., dissenting). Georgia's death penalty was declared constitutional in *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 2929, 49 L.Ed.2d 859 (1976). Petitioner's Claim "I" is therefore without merit.

XIV. CLAIM "Q"—PETITIONER'S BRADY CLAIM.

Petitioner contends that prior to trial defense counsel filed a *Brady* motion seeking, *inter alia*, statements he was alleged to have been made and that the State failed to produce the statement that was alleged to have been made to Offie Evans while in the Fulton County Jail. Petitioner contends that this failure to produce the statement prior to trial entitles him to a new trial.

[49, 50] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) requires, the prosecution to produce any evidence in its possession which would tend to be favorable or exculpatory to the defendant. However, *Brady* does not establish any right to pretrial discovery in a criminal case, but instead seeks only to insure the fairness of a defendant's trial and the reliability of the jury's determinations. *United States v. Beasley*, 576 F.2d 626 (5th Cir.1978), *cert. denied*, 440 U.S. 947, 99 S.Ct. 1426, 59 L.Ed.2d 636 (1979). Thus, a defendant who seeks a new trial under *Brady* must meet three require-

ments to establish a successful claim: "(1) The prosecutor's suppression of the evidence, (2) the favorable character of the suppressed evidence for the defense, and (3) the materiality of the suppressed evidence." *Martinez v. Wainwright*, 621 F.2d 184 (5th Cir.1980); *United States v. Preston*, 608 F.2d 626, 637 (5th Cir.1979), *cert. denied*, 446 U.S. 940, 100 S.Ct. 2162, 64 L.Ed.2d 794 (1980); *United States v. Delk*, 586 F.2d 513, 518 (5th Cir.1978).

[51] As a preliminary matter the court notes that the testimony of Offie Evans was hardly favorable to petitioner. Most of the testimony was highly damaging to petitioner. The only part of the testimony which could even remotely be regarded as favorable was Evans' testimony that McCleskey had told him that his face had been made up on the morning of the robbery by Mary Jenkins. This testimony contradicted Mary Jenkins' earlier testimony and thus had impeachment value against one of the State's witnesses. However, the very testimony that would have been impeached was testimony favorable to petitioner. Jenkins' testimony that petitioner had clear skin and no scar on the day of the crime contradicted the testimony of the store employees that the person in the front of the store had a rough, pimply complexion and a scar. Thus, Jenkins' testimony regarding petitioner's complexion on the morning of the crime helped create doubt in his favor. Impeachment of that testimony would have hurt rather than helped petitioner.

As a secondary matter, the court cannot see that the evidence in question was suppressed by the prosecution. While it was not produced prior to trial, it was produced during the trial. Thus, the jury was able to consider it in its deliberations. Petitioner has produced no cases to support the propositon that the failure of the prosecution to produce evidence prior to trial entitles him to a new trial where that evidence was produced during the trial. Since the evidence was before the jury, the court cannot find that the failure to disclose it prior to trial deprived petitioner of due process. Petitioner's Claim "Q" is clearly without merit.

XV. CLAIM "R"—SUFFICIENCY OF THE EVIDENCE.

By this claim petitioner contends that the evidence introduced at trial was insufficient to prove beyond a reasonable doubt that he was the triggerman who shot Officer Schlatt and that the shooting constituted malice murder. Petitioner does not argue that the evidence was insufficient to support his conviction for armed robbery.

[52] As part of its review in this case, the Supreme Court found that "the evidence factually substantiates and supports the finding of the aggravating circumstances, the finding of guilt, and the sentence of death by a rational trier of fact beyond a reasonable doubt." *McClesky v. State*, 245 Ga. 108, 115, 263 S.E.2d 146 (1980). In reviewing the sufficiency of the evidence, this court must view the evidence in a light most favorable to the State and should sustain the jury's verdict unless it finds that no rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Much of the evidence against petitioner was circumstantial. Witnesses placed him in the front of the store carrying a nickel-plated revolver matching the description of a .38 caliber Rossi which petitioner had stolen in an earlier armed robbery. The State's ballistics expert testified that the bullet which killed Officer Schlatt was probably fired from a .38 caliber Rossi. At least one witness testified that the shots were fired from a point closer to the front of the store than she was lying.

[53] While the circumstantial evidence alone may not have been sufficient to support a verdict of malice murder, the State also introduced highly damaging testimony by one of the co-defendants, Ben Wright, and a fellow inmate at the Fulton County Jail, Offie Evans. Both of these witnesses testified that petitioner had admitted shooting Officer Schlatt. Evans testified that

McCleskey told him that he would have shot his way out of the store even if there had been a dozen police officers. It is not this court's function to weigh the credibility of this testimony. That was for the jury to do. Viewing all the evidence in a light most favorable to the State, this court cannot find that no rational trier of fact could find petitioner guilty beyond a reasonable doubt of malice murder. *Jackson v. Virginia, supra.* Petitioner's Claim "R" is therefore without merit.

XVI. CLAIM "P"—INEFFECTIVE ASSISTANCE OF COUNSEL

By this claim petitioner contends that he was denied effective assistance of counsel in contravention of the Sixth and Fourteenth Amendments. He alleges that his counsel was ineffective for the following reasons: (1) That his attorney failed to investigate adequately the State's evidence and possible defenses prior to trial; (2) that during the trial counsel failed to raise certain objections or make certain motions; (3) that prior to the sentencing phase of petitioner's trial counsel failed to undertake an independent investigation into possible mitigating evidence and thus was unable to offer any mitigating evidence to the jury; and (4) that after the trial, counsel failed to review and correct the judge's sentence report.

[54–57] It is well established in this circuit that a criminal defendant is entitled to effective assistance of counsel—that is, "counsel reasonably likely to render and rendering reasonably effective assistance." *See, e.g., Washington v. Strickland,* 693 F.2d 1243, 1250 (5th Cir. Unit B, 1982) (en banc), *cert. granted,* — U.S. —, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983); *Gaines v. Hopper,* 575 F.2d 1147, 1149 (5th Cir. 1978); *Herring v. Estelle,* 491 F.2d 125, 127 (5th Cir.1974); *MacKenna v. Ellis,* 280 F.2d 592, 599 (5th Cir.1960), *cert. denied,* 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). However, the Constitution does not guarantee errorless counsel or counsel judged ineffective only by hindsight. *Herring v. Estelle, supra.* In order to be entitled to habeas corpus relief on a claim of ineffective assistance of counsel, petitioner must establish by a preponderance of the evidence: (1) That based upon the totality of circumstances in the entire record his counsel was not "reasonably likely to render" and in fact did not render "reasonably effective assistance," and (2) that "ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense." *Washington v. Strickland,* 693 F.2d 1243, 1262 (5th Cir. Unit B 1982) (en banc). Even if petitioner meets this burden, habeas corpus relief may still be denied if the State can prove that "in the context of all the evidence . . . it remains certain beyond a reasonable doubt that the outcome of the proceedings would not have been altered but for the ineffectiveness of counsel." *Id.* With these standards in mind the court now addresses petitioner's particular contentions.

A. *Pretrial Investigation.*

It is beyond dispute that effective assistance of counsel requires some degree of pretrial investigation. "Informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are cornerstones of effective assistance of counsel." *Gaines v. Hopper,* 575 F.2d 1147, 1149–50 (5th Cir.1978). In *Washington v. Strickland,* 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), the court discussed the extent of pretrial investigation required to constitute effective assistance of counsel. In that case the court stated:

> The amount of pretrial investigation that is reasonable defies precise measurement. It will necessarily depend upon a variety of factors including the number of issues in the case, relative complexity of those issues, the strength of the government's case, and the overall strategy of trial counsel. . . . In making that determination, courts should not judge the reasonableness of counsel's efforts from the omniscient perspective of hindsight, but rather "from the perspective of counsel, taking into account all of the circumstances of the case, but only as

those circumstances were known to him at the time in question." *Id.* at 1251 (quoting *Washington v. Watkins*, 655 F.2d 1346 at 1356 [5th Cir. Unit A 1981]).

The court went on to analyze a variety of cases falling into five general categories.[34] The category of cases identified by the *Washington* court which most closely resembles the present case was the one in which "counsel fails to conduct a substantial investigation into one plausible line of defense because of his reasonable strategic choice to rely upon another plausible line of defense at trial." In analyzing these cases the court stated:

> As observed above, when effective counsel would discern several plausible lines of defense he should ideally perform a substantial investigation into each line before making a strategic decision as to which lines he will employ at trial. In this ideal, as expressed in the American Bar Association's Standards, is an aspiration to which all defense counsel should strive. It does not, however, represent the constitutional minimum for reasonably effective assistance of counsel.... Realistically, given the finite resources of time and money that are available to defense counsel, fewer than all plausible lines of defense will be the subject of substantial investigation. Often, counsel will make a choice of trial strategy relatively early in the representation process after conferring with his client, reviewing the State's evidence, and bringing to bear his experience and professional judgment. Thereafter, he will constitute his finite resources on investigating those lines of defense upon which he has chosen to rely.
>
> The choice by counsel to rely upon certain lines of defense to the exclusion of others before investigating all such lines is a strategic choice. ....
>
> A strategy chosen without the benefit of a reasonably substantial investigation into all plausible lines of defense is generally based upon counsel's professional assumptions regarding the prospects for success offered by the various lines. The cases generally conform to a workable and sensible rule: When counsel's assumptions are reasonable, given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial. 693 F.2d at 1254–55.

[58] In the present case petitioner's trial counsel was faced with two plausible lines of defense—an alibi defense or a defense that petitioner participated in the robbery but was not the triggerman who killed Officer Schlatt. Pursuing the second defense would almost have guaranteed a conviction for armed robbery and felony murder, for which petitioner could still have received the death penalty or at least life imprisonment.[35] On the other hand, a successful alibi defense offered the prospect of no punishment at all. Trial counsel testified at the state habeas corpus hearing that McCleskey had repeatedly insisted that he was not present at the crime. Trial counsel also testified that after the preliminary hearing he and McCleskey reasonably

34. The five categories of cases dealing with claims of ineffective assistance of counsel in the pretrial investigation were: (1) counsel fails to conduct substantial investigation into the one plausible line of defense in the case, (2) counsel conducts a reasonably substantial investigation into the one line of defense that is presented at trial; (3) counsel conducts a reasonably substantial investigation into all plausible lines of defense and chooses to rely upon fewer than all of them at trial; (4) counsel fails to conduct a substantial investigation into one plausible line of defense because of his reasonable strategic choice to rely upon another plausible line of defense at trial; and (5) counsel fails to conduct a substantial investigation into plausible lines of defense for reasons other than strategic choice.

35. Under Georgia law applicable at the time of petitioner's trial, petitioner, as a party to the crime of armed robbery, would have been subject to the same penalty for the death of Officer Schlatt irrespective of whether he actually pulled the trigger. *See* Ga.Code Ann. § 26-801 (now codified at O.C.G.A. § 16-2-21). Under Georgia law at the time both murder and felony murder were punishable by death or life imprisonment. Ga.Code Ann. § 26-1101 (now codified at O.C.G.A. § 16-5-1).

believed that an alibi defense could be successful. A primary reason for this belief was that Mamie Thomas, one of the Dixie Furniture Mart employees who was up front when the robber came in and had an opportunity to observe him, was unable to identify McCleskey at the preliminary hearing, despite the fact that she was standing only a few feet from him. Given the contradictory descriptions given by the witnesses at the store, the inability of Mamie Thomas to identify petitioner, and petitioner's repeated statements that he was not present at the scene, and the possible outcome of pursuing the only other defense available, the court cannot say that trial counsel's decision to pursue the alibi defense was unreasonable or constituted ineffective assistance of counsel.

[59] Having made a reasonable strategic choice to pursue an alibi defense, trial counsel could reasonably have decided not to interview all of the store employees. None of the statements produced by petitioner indicates that these employees would have contradicted the State's theory of the case. At best, they might have cumulatively created a reasonable doubt as to whether petitioner was the triggerman. This, however, was a defense counsel and petitioner had chosen not to pursue. Counsel had read their statements and concluded that none of these employees could identify McCleskey as the gunman who entered the front of the store. He also had the sworn testimony of at least one witness that McCleskey was definitely not the person who entered the front of the store. Under such circumstances the failure to interview the store employees was reasonable. *See Washington v. Watkins*, 655 F.2d 1346 (5th Cir. Unit A 1981), *cert. denied*, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982) (failure to interview in person the only eye witness to an armed robbery and murder not ineffective assistance of counsel where client was asserting an alibi defense and telephone interview had established that witness could not identify or describe the gunman).[36]

[60] Slightly more troubling than the failure to interview the witnesses at the store was counsel's failure to interview the sheriff's deputies and Offie Evans prior to trial. Evans' testimony was certainly very damaging to petitioner, and a pretrial investigation as to what his testimony would be may have uncovered the details of his escape from a halfway house and the pending federal charges against him, his "understanding" with an Atlanta police detective, his history of drug use, and his imaginative story that he had gone to Florida and participated in an undercover drug investigation during his escape. Discovery of such evidence would have had substantial impeachment value. However, this court cannot find on the facts before it that counsel acted unreasonably in failing to interview Evans prior to trial. Although he recognized that at least one of the names in the prosecution's witness list was a Fulton County Sheriff's Deputy and suspected that a jailhouse confession might be forthcoming, counsel testified that McCleskey told him that he had made absolutely no incriminating statements to anyone in the Fulton County Jail. There has been no allegation that petitioner was incompetent or insane at any time during this proceeding. It would be anomalous, then, for this court to grant petitioner habeas corpus relief on the grounds that petitioner's counsel was ineffective because he did not disbelieve petitioner and undertake an independent investigation.

[61] Finally, petitioner contends that his counsel was ineffective because he

36. Although Mamie Thomas recanted her testimony immediately after the preliminary hearing, telling one of the detectives that she had lied because she was scared, and a later interview with her may have disclosed the change of testimony, this court cannot hold as a matter of law that counsel has a duty to disbelieve sworn testimony of a witness favorable to his client. In other words, counsel could reasonably believe that the witness's testimony at trial would be substantially the same as it was at the preliminary hearing. When it turned out to be different, counsel took the proper step of impeaching her later testimony with her testimony at the preliminary hearing.

failed to interview the State's ballistics expert, Kelly Fite. However, a similar claim was rejected on similar facts in *Washington v. Watkins*, 655 F.2d at 1358. Petitioner's counsel had read the expert's report and was prepared adequately to cross-examine the expert at trial. The court does not believe, therefore, that the failure to interview the witness in person prior to trial constituted ineffective assistance of counsel.

B. *Performance During the Trial: Guilt/Innocence Phase.*

[62] Petitioner also contends that counsel's conduct of the trial was deficient in several respects. First, petitioner contends that the failure to move for a continuance or a mistrial when he learned of the suggestive line-up procedure on the morning of the trial constituted ineffective assistance. However, the court has already concluded in Part X, *supra*, that there was nothing unconstitutional about the chance viewing of the defendants prior to trial. The viewing therefore would not have been grounds for a mistrial or a continuance. Failure to make a motion unwarranted in law is not ineffective assistance of counsel.

[63] Petitioner also contends that his counsel failed to object to admission of evidence regarding prior convictions and sentences for armed robbery. Petitioner makes the somewhat technical argument that because these convictions had been set aside by the granting of a motion for a new trial that they were inadmissible. Petitioner further contends that counsel did not object to this evidence because he had failed to investigate the circumstances of these convictions prior to trial.[37] Assuming for the moment that the failure to investigate these convictions constituted ineffective assistance of counsel, the court is unconvinced that petitioner can show actual and substantial prejudice resulted from the ineffectiveness. *See Washington v. Strickland*, 693 F.2d 1243, 1262 (5th Cir. Unit B 1982) (en banc) *cert. granted*, — U.S. —, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). First, petitioner does not contend that he was not guilty of those crimes. In fact, after being granted a new trial he pleaded guilty to them and received an 18-year sentence. The court has already held that under Georgia law those crimes were admissible to show that petitioner engaged in a pattern or practice of armed robberies. The court cannot say that counsel's failure to object to the introduction of this evidence at the guilt stage caused petitioner actual and substantial prejudice. Also, while the jury did learn that petitioner had received life sentences which had subsequently been set aside and this fact may have prejudiced them at the penalty stage of petitioner's trial,[38] the court is unprepared to say that in the context of all of the evidence, the failure of counsel to object to the introduction of this evidence warrants petitioner a new trial. However, given the court's holding in Part III, *supra*, this point is essentially moot.

[64] Finally, petitioner contends that trial counsel was ineffective because he failed to object to the trial court's "overly broad instructions to the jury (1) with regard to presumptions of intent and (2) as to the use of 'other acts' evidence for proof of intent, and (3) as aggravating circumstances at the sentencing phase." Petitioner's September 20, 1983 Memorandum of Law in Support of Issuance of the Writ at 64. This court has already found that the trial court's instructions were not erroneous or overbroad. *See* Parts IV, VII and VIII, *supra*. Failure to object to the instructions was not, therefore, ineffective assistance of counsel.

C. *Ineffective Assistance at Trial—Sentencing Phase*

[65] Petitioner has contended that trial counsel was ineffective because he failed to

37. Pursuant to Ga.Code Ann. § 27-2503(a) the State informed trial counsel on October 2, 1978 that it intended to offer in aggravation certain prior convictions and sentences of petitioner. The convictions and sentences which petitioner contends were invalid were among those listed.

38. See note 25 *supra*.

undertake an independent investigation to discover and produce mitigating evidence and witnesses to testify on behalf of petitioner at the sentencing phase of his trial. Trial counsel testified that he asked petitioner for names of persons who would be willing to testify for him and that petitioner was unable to produce a single name. Counsel also testified that he contacted petitioner's sister and that she also was unable to produce any names.[39] A review of trial counsel's testimony at the state habeas hearing convinces this court that counsel made a reasonable effort to uncover mitigating evidence but could find none. Petitioner's sister declined to testify on her brother's behalf and told counsel that petitioner's mother was unable to testify because of illness. *McCleskey v. Zant*, H.C. No. 4909, Slip Op. at 19 (Sup.Ct. of Butts County, April 8, 1981). The record simply does not support a finding of actual and substantial prejudice to petitioner due to any ineffective assistance by petitioner's counsel at the sentencing phase of the trial.

D. *Ineffective Assistance—Post-Trial.*

[66] Petitioner contends that trial counsel was also ineffective in failing to correct inaccuracies and omissions in the trial judge's post-trial sentencing report.[40] This report is used by the Georgia Supreme Court as part of its review of whether the sentence imposed was arbitrary, excessive, or disproportionate.[41] While it was in part because the Georgia capital sentencing procedure provided such a review that the Supreme Court upheld the Georgia death penalty in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the Supreme Court has recently declared that such proportionality reviews are not required by the Constitution. *Pulley v. Harris*, — U.S. —— at ——-——, 104 S.Ct. 871 at 876–881, 79 L.Ed.2d 29 (1984). Since proportionality reviews are not required by the Constitution, it is difficult for this court to see actual and substantial prejudice caused to petitioner by counsel's failure to review and correct mistakes in the trial judge's report, even if such failure would constitute ineffective assistance of counsel.

Since the court has concluded that petitioner has been unable to show actual and substantial prejudice caused by any ineffective assistance of counsel, petitioner's Claim "P" is without merit.

XVII. CONCLUSION

For the reasons set forth in Part III, *supra*, it is ORDERED, ADJUDGED, and DECREED that petitioner's conviction for malice murder be set aside and that petitioner within one hundred twenty (120) days after this judgment becomes final as a result of the failure of respondent to lodge an appeal or as the result of the issuance of a mandate affirming this decision, whichever is later, be reindicted and tried, failing which this writ of habeas corpus without further order shall be made absolute.

39. The sister testified at the state habeas hearing that counsel never asked her for any names and that if he had done so she would have been ready, willing and able to produce a number of names. The habeas court specifically chose to credit the testimony of the trial counsel rather than the sister. *See McCleskey v. Zant*, H.C. No. 4909, Slip Op. at 19 (Sup.Ct. of Butts County, April 8, 1981). This finding of fact is presumed to be correct. 28 U.S.C. § 2254(d).

40. Georgia's capital sentencing procedure provides for the filing of a trial judge's report to be part of the record reviewed by the Georgia Supreme Court on appeal. O.C.G.A. § 17-10-35.

41. For a discussion of proportionality analysis in Eighth Amendment jurisprudence see Comment *"Down the Road Toward Human Decency": Eighth Amendment Proportionality Analysis and Solem vs. Helm*, 18 Ga.L.Rev. 109 (1983).

Gloria PADILLA, Plaintiff,

v.

Luis M. d'AVIS and City of Chicago, Defendants.

Anita JONES, Plaintiff,

v.

Luis M. d'AVIS and City of Chicago, Defendants.

Nos. 83 C 6390, 82 C 2943.

United States District Court, N.D. Illinois, E.D.

Feb. 1, 1984.

Patients brought action against city and physician arising out of sexual assaults by physician during course of his gynecological examinations of patients at city health facility. On a motion to reconsider previous dismissal of one complaint, and defendants' motions to dismiss, the District Court, Shadur, J., held that: (1) patients stated section 1983 cause of action against city; (2) physician was not engaged in "state action" and therefore patients failed to state a cause of action under section 1983 against him; and (3) patients failed to state a cause of action under state law against city.

Ordered accordingly.

1. **Federal Civil Procedure** ⇐1829, 1835

On motion to dismiss, all factual allegations in complaint are taken as true and all reasonable and factual inferences are drawn in favor of plaintiff.

2. **Civil Rights** ⇐13.17(7)

A city has no punitive damages liability under section 1983. 42 U.S.C.A. § 1983.

3. **Civil Rights** ⇐13.7

Absent some formally promulgated standard of conduct, such as an ordinance or administrative regulation, a section 1983 cause of action against a municipality must be grounded on some direct municipal act or omission or some municipal policy, custom or practice that in either event prox-

Appendix C -

Order of the Court of Appeals, dated March 26, 1985 denying rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
MAR 26 1985
SPENCER D. MERCER
CLERK

No. 84-8176

WARREN MCCLESKEY,

Petitioner-Appellee,
Cross-Appellant,

versus

RALPH KEMP, Warden,

Respondent-Appellant,
Cross-Appellee.

- - - - - - - - - - - -

On Appeal from the United States District Court for the
Northern District of Georgia

- - - - - - - - - - - -

(March 26, 1985)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied

ENTERED FOR THE COURT:

Paul H. Roney

UNITED STATES CIRCUIT JUDGE

Appendix D -

Statutory Provisions Involved

STATUTORY PROVISIONS INVOLVED

Ga. Code Ann. § 26-603:

The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted.

Ga. Code Ann. § 26-604:

A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted.

Ga. Code Ann. § 26-1101:

(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

Ga. Code Ann. § 59-806(4):

"Are you concientiously opposed to capital punishment?" If he shall answer the question in the negative, he shall be held a competent juror. Provided, nevertheless, that either the State or the defendant shall have the right to introduce evidence before the judge to show that the answers, or any of them, are untrue; and it shall be the duty of the judge to determine upon the truth of such answers as may be thus questioned before the court.

Ga. Code Ann. § 59-807:

If a juror shall answer any of the questions set out in the preceding section so as to render him incompetent, or he shall be so found by the judge, he shall be set aside for cause.

Appendix E -

Statements of Facts from Petitioner's Post-Hearing Memorandum of Law in Support of His Claims of Arbitrariness and Racial Discrimination, submitted to the District Court in McCleskey v. Zant, No. C81-2434A; and Statement of Facts from En Banc Brief for Petitioner McCleskey, submitted to the Court of Appeals in McCleskey v. Kemp, No. 84-8176.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WARREN McCLESKEY, Petitioner,	)	
-against-	)	CIVIL ACTION NO. C81-2434A
WALTER D. ZANT, Superintendent, Georgia Diagnostic & Classification Center, Respondent.	)	

PETITIONER'S POST-HEARING MEMORANDUM OF LAW IN SUPPORT OF HIS CLAIMS OF ARBITRARINESS AND RACIAL DISCRIMINATION

ROBERT H. STROUP
1515 Healy Building
Atlanta, Georgia 30303

JOHN CHARLES BOGER
10 Columbus Circle
New York, New York 10019

TIMOTHY K. FORD
600 Pioneer Building
Seattle, Washington 94305

ANTHONY G. AMSTERDAM
New York University Law School
40 Washington Square South
New York, New York 10012

ATTORNEYS FOR PETITIONER

invitation. In it, petitioner will first outline the evidence presented to the Court,[3] and then state the legal foundations of his constitutional claims.

STATEMENT OF FACTS

I. Petitioner's Case-in-Chief

A. Professor David Baldus

1. Areas of Expertise

Petitioner's first expert witness was Professor David C. Baldus, currently Distinguished Professor of Law at the University of Iowa. Professor Baldus testified that a principal focus of his academic research and writing during the past decade has been upon the use of empirical social scientific research in legal contexts. During that time, Professor Baldus has co-authored a widely cited (see DB6)[4] work on the law of discrimination, see D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980), as well as a number of significant articles analyzing the use of statistical techniques in the assessment of claims of

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3/ Due to the length and complexity of the evidentiary hearing, and the fact that no transcript of the testimony has yet been completed, petitioner does not purport to set forth a comprehensive statement of the evidence in this memorandum. Instead, the statement of facts will necessarily be confined to a review of the principal features of the evidence.

4/ Each reference to petitioner's exhibits will be indicated by a reference to the initials of the witness during whose testimony the exhibit was offered (e.g., David Baldus becomes "DB"), followed by the exhibit number.

has served as a consultant to an eminent Special Committee on Empirical Data in Legal Decision-Making of the Association of the Bar of the City of New York.

After hearing his qualifications, the Court accepted Professor Baldus as an expert in "the empirical study of the legal system, with particular expertise in methods of analysis and proof of discrimination in a legal context."

2. Development of Research Objectives

Professor Baldus testified that he first became interested in empirical research on a state's application of its capital puhishment statutes shortly after Gregg v. Georgia, 428 U.S. 153 (1976) and related cases had been announced by the Supreme Court in mid-1976. Those cases, Baldus explained, explicitly rested upon certain assumptions about how the post-Furman capital statutes would operate: (i) that sentencing decisions would be guided and limited by the criteria set forth in capital statutes; (ii) that under such statutes, cases would receive evenhanded treatment; (iii) that appellate sentence review would guarantee statewide uniformity of treatment, by corrcting any significant disparities in local disposition of capital cases; and (iv) that the influenced of illegitimate factors such as race or sex, would be eliminated by these sentencing constraints on prosecutorial and jury discretion.

Professor Baldus testified that his own research and training led him to conclude that the Supreme Court's assump-

tions in Gregg were susceptible to rigorous empirical evalution employing accepted statistical and social scientific methods. Toward that end -- in collaboration with two colleagues, Dr. George Woodworth, an Associate Professor of Statistics at the University of Iowa, and Professor Charles Pulaski, a Professor of Criminal Law now at Arizona State University Law School -- Baldus undertook in 1977 the preparation and planning of a major research effort to evaluate the application of post-Furman capital statutes. In the spring semester of 1977, Professor Baldus began a review of previous professional literature on capital sentencing research and related areas, which eventually comprised examination of over one hundred books and articles. (See DB13.)[8/] Baldus and his colleagues also obtained access to the most well-known prior data sets on the imposition of capital sentences in the United States, including the Wolfgang rape study which formed the empirical basis for the challenge brought in Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968), rev'd on other grounds, 398 U.S. 262 (1970), and the Stanford Law School study.[9/] They examined the questionnaires em-

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8/ Baldus testified that his research was particularly aided by other pioneering works on racial discrimination in the application of capital statutes, see, e.g., Johnson, "The Negro and Crime," 217 ANNALS 93 (1941); Garfinkel, "Research Note on Inter- and Intra- Racial Homicide," 27 SOCIAL FORCES 369 (1949); Wolfgang & Riedel, "Race, Judicial Discretion, and the Death Penalty," 407 ANNALS 119 (1973); Wolfgang & Riedel, "Rape, Race, and the Death Penalty in Georgia," 45 AM. J. ORTHO PSYCHIAT. 658 (1975); Bowers & Pierce, "Arbitrariness and Discrimination under Post-Furman Capital Statutes," 26 CRIME & DELINQ. 563 (1980).

9/ See "A Study of the California Penalty Jury in First Degree Murder Cases," 21 STAN. L. REV. 1297 (1969).

ployed in those studies, reran the analyses conducted by prior researchers, and ran additional analyses to learn about factors which might be important to the conduct of their own studies.

After these preliminary investigations, Baldus and his colleagues began to formulate the general design of their own research. They settled upon a retrospective non-experimental study as the best available general method of investigation.[10/] They then chose the State of Georgia as the jurisdiction for study, based upon a consideration of such factors as the widespread use in other jurisdictions of a Georgia-type capital statute,[11/] the favorable accessibility of records in Georgia, and numbers of capital cases in that state sufficiently large to meet statistical requirements for analysis of data.

3. Procedural Reform Study ("PRS")

The first of the two Baldus studies, the Procedural Reform Study, was a multi-purpose effort designed not only to address the question of possible discrimination in the admin-

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10/ Under such a design, researchers gather data from available records and other sources on plausible factors that might have affected an outcome of interest (here the imposition of sentence in a homicide case) in cases over a period of time. They then used statistical methods to analyze the relative incidence of those outcomes dependent upon the presence or absence of the other factors observed. Professor Baldus testified that this method was successfully employed in, among others, the National Halothane Study, which Baldus and his colleagues reviewed carefully for methodological assistance.

11/ Baldus testified that he made inquiry of the Georgia Department of Offender Rehabilitation, the Georgia Department of Pardons and Paroles, and the Georgia Supreme Court, all of which eventually agreed to make their records on homicide cases available to him for research purposes. (See DB 24.)

istration of Georgia's capital statutes, but to examine appellate sentencing review, pre- and post-Furman sentencing, and other questions not directly relevant to the issues before this Court. Professor Baldus limited his testimony to those aspects and findings of the PRS germane to petitioner's claims.

The PRS, initially supported by a small grant from the University of Iowa Law Foundation, subsequently received major funding for data collection from the National Institute of Justice, as well as additional funds from Syracuse University Law School. Work in the final stages of data analysis was assisted by a grant from the Edna McConnell Clark Foundation distributed through the NAACP Legal Defense and Educational Fund, Inc. Research data collection and analysis for the PRS took place from 1977 through 1983.

a. Design of PRS

In formulating their research design for the PRS, Baldus and his colleagues first identified the legal decision-points within the Georgia charging and sentencing system which they would study and then settled upon the "universe" of cases on which they would seek information. After reviewing the various stages which characterize Georgia's procedure for the disposition of homicide cases (see DB21), Baldus decided to focus the PRS on two decision-points: the prosecutor's decision whether to seek a death sentence once a murder conviction had been obtained

at trial; and the jury's sentencing verdict following a penalty trial. Baldus defined the universe of cases to include all persons arrested between the effective date of Georgia's post-Furman capital statute, March 28, 1973, and June 10, 1978 (i) who were convicted of murder after trial and received either life or death sentences, or (ii) who received death sentences after a plea of guilty, and who either (i) appealed their cases to the Supreme Court of Georgia (ii) or whose cases appeared in the files of both the Department of Offender Rehabilitation ("DOR") and the Department of Pardons and Paroles ("DPP").[12/] This universe comprised 594 defendants. (See DB 26.) Penalty trials had occurred in 193 of these cases, including 12 in which two or more penalty trials had taken place, for a total of 206 penalty trials. In all, 113 death sentences had been imposed in these 206 trials.

For each case within this universe, Baldus and his colleagues proposed to collect comprehensive data on the crime, the defendant, and the victim. Factors were selected for inclusion in the study based upon the prior research of Baldus, a review of questionnaires employed by other researchers such as Wolfgang as well as upon the judgment of Baldus, Pulaski and others about what factors might possibly influence prosecutors

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12/ The decision to limit the universe to cases in which a murder conviction or plea had been obtained minimized concern about difference in the strength of evidence of guilt. The decision to limit the universe to cases in which an appeal had been taken or in which DOR and DPP files appeared was a necessary restriction based upon availability of data.

and juries in their sentencing decisions. The initial PRS questionnaire, titled the "Supreme Court Questionnaire," was drafted by Baldus working in collaboration with a law school graduate with an advanced degree in political science, Frederick Kyle (see DB 27), and went through many revisions incorporating the suggestions of Pulaski, Woodworth, and others with whom it was shared. In final form, the Supreme Court Questionnaire was 120 pages in length and addressed over 480 factors or "variables." After preliminary field use suggested the unwieldiness of the Supreme Court Questionnaire, and after analysis revealed a number of variables which provided little useful information, a second, somewhat more abbreviated instrument, titled the Georgia Parole Board (or Procedural Reform Study) Questionnaire, was developed (see DB 35). Much of the reduction in size of this second questionnaire came from changes in its physical design to re-format the same items more compactly. Other variables meant to permit a coder to indicate whether actors in the sentencing process had been "aware" of a particular variable were dropped as almost impossible to determine from available records in most instances. A few items were added to the second questionnaire. Eventually, information on 330 cases was coded onto the Supreme Court Questionnaire, while information on 351 cases was coded onto the Georgia Parole Board Questionnaire. Eighty-seven cases were coded onto both questionnaires. (See DB 28, at 2.)

b. Data Collection for PRS

Data collection efforts for the PRS began in Georgia during the summer of 1979. Baldus recruited Frederick Kyle, who had assisted in drafting the Supreme Court Questionnaire, and two other students carefully selected by Baldus for their intelligence and willingness to undertake meticulous detail work. Initially, the Supreme Court Questionnaires were filled out on site in Georgia; quickly, however, it became evident that because of the unwieldiness of that questionnaire, a better procedure would be to gather information in Georgia which would later be coded onto the questionnaires at the University of Iowa. Several items were collected for this purpose, including: (i) a Georgia Supreme Court opinion, if one had been rendered (see DB 29); (ii) a trial judge's report prepared pursuant to Ga. Code Ann. § 27-2537(a), if one was available in the Georgia Supreme Court (see DB 30); (iii) a "card summary" prepared by the Assistant to the Supreme Court of Georgia, if available (see DB 31); a procedural record of the case (see DB 32); (iv) an abstract of the facts, dictated or prepared by the coders in Georgia from the appellate briefs in the case, supplemented by transcript information (see DB 33); and a narrative summary of the case (see DB 3, at 3).

In addition to those data sources, Baldus and his colleagues relied upon basic information on the crime, the defendant and the victim obtained from the Department of Pardons and Paroles, information on the defendant obtained from the Department of Offender Rehabilitation, information on the sex, race and age

of the victim -- if otherwise unavailable -- obtained from Georgia's Bureau of Vital Statistics, as well as information on whether or not a penalty trial had occurred, obtained from counsel in the cases if necessary (see DB 28; DB 36).

The 1979 data collection effort continued in the fall of 1980 under the direction of Edward Gates, a Yale graduate highly recommended for his care and precision by former employers at a Yale medical research facility. Baldus trained Gates and his co-workers during a four-day training session in August, 1980, in the office of Georgia's Board of Pardons and Paroles, familiarizing them with the documents, conducting dry run tests in questionnaire completion, and discussing at length any problems that arose. To maintain consistency in coding, Baldus developed a set of rules or protocols governing coding of the instruments, which were followed by all the coders. These protocols were reduced to written form, and a copy was provided to Gates and other coders in August of 1980. Baldus, who returned to Iowa, remained in contact with Gates daily by telephone, answering any questions that may have arisen during the day's coding.[13/]

C. Data Entry and Cleaning for PRS

To code the abstracts and other material forwarded

13/ While information on most of the cases in the PRS was gathered in 1979 and 1980, Edward Gates completed the collection effort in the final 80 cases during the summer of 1981. (See DB 28, at 2.)

from Georgia onto the Supreme Court and PRS questionnaires, University of Iowa law students with criminal law course experience, again chosen for intelligence, diligence, and care in detailed work. The students received thorough training from Professors Baldus and Pulaski, and they worked under the supervision of Ralph Allen, a supervisor who checked each questionnaire. The students held regular weekly meetings to discuss with Professor Baldus and their supervisor any problems they had encountered, and consistent protocols were developed to guide coding in all areas.

Following the manual coding of the questionnaires, Professor Baldus hired the Laboratory for Political Research at the University of Iowa to enter the data onto magnetic computer tape. Rigorous procedures were developed to ensure accurate transposal of the data, including a special program to signal the entry of any unauthorized codes by programmers. A printout of the data entered was carefully read by professionals against the original questionnaires to spot any errors, and a worksheet recorded any such errors for correction on the magnetic tapes (see DB 50).

3. Charging and Sentencing Study ("CSS")

In 1980, Professor Baldus was contacted for advice by the NAACP Legal Defense Fund in connection with a grant application being submitted to the Edna McConnell Clark Foundation seeking funds to conduct social scientific research into the death

penalty. Several months later, the Legal Defense Fund informed Baldus that the grant had been approved and invited him to conduct the research. Under that arrangement, the Legal Defense Fund would provide the funds for the out-of-pocket expenses of a study, ceding complete control over all details of the research and analysis to Professor Baldus (apart from the jurisdiction to be studied, which would be a joint decision). Once the analysis had been completed, Baldus would be available to testify concerning his conclusions if the Legal Defense Fund requested, but Baldus would be free to publish without restriction whatever findings the study might uncover.[14/] After some further discussions, the parties agreed in the fall of 1980 to focus this Charging and Sentencing Study ("CSS") on the State of Georgia.

a. Design of CSS

The CSS, by focusing once again on the State of Georgia, permitted Professor Baldus and his colleagues to enlarge their PRS inquiry in several important respects: first, they were able, by identification of a different universe, to examine decision-points in Georgia's procedural process stretching back to the point of indictment, thereby including information on prosecutorial plea-bargaining decisions as well as jury guilt determinations; secondly, they broadened their inquiry to include

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14/ Baldus indeed expressly informed LDF at the outset that his prior analysis of the Stanford Study data left him skeptical that any racial discrimination would be uncovered by such research.

cases resulting in voluntary manslaughter convictions as well as murder convictions; and thirdly by development of a new questionnaire, they were able to take into account strength-of-evidence variables not directly considered in the PRS. Beyond these advances, the deliberate overlapping of the two related studies provided Professor Baldus with a number of important means to confirm the accuracy and reliability of each study.

To obtain these benefits, Baldus defined a universe including all offenders who were arrested before January 1, 1980 for a homicide committed under Georgia's post-Furman capital statutes, who were subsequently convicted of murder or of voluntary manslaughter. From this universe of 2484 cases, Professors Baldus and Woodworth drew two samples.[15/] The first, devised according to statistically valid and acceptable sampling procedures (see the testimony of Dr. Woodworth, infra), comprised a sample of 1066 cases, stratified to include 100% of all death-sentenced cases,[16/] 100% of all life-sentenced cases afer a penalty trial, and a random sample of 41% of all life-sentenced cases without a penalty trial, and 35% of all voluntary manslaughter cases. The stratification had a second dimension; Professors Baldus and Woodworth designed the sample to include a minimum 25% representation of cases from each of Georgia's 42 judicial circuits to ensure full statewide coverage.

15/ As indicated above, the PRS did not involve any sampling procedures. All cases within the universe as defined were subject to study.

16/ Because of the unavailability of records on one capitally-sentenced inmate, the final sample includes only 99% (127 of 128) of the death-sentenced cases.

The second sample employed by Baldus and Woodworth in the CSS included all penalty trial decisions known to have occurred during the relevant time period, on which records were available, a total of 253 of 254. Among those 253, 237 also appeared in the larger CSS Stratified Sample of 1066; the remaining 16 cases comprised 13 successive penalty trials for defendants whose initial sentences had been vacated, as well as 3 cases included in Georgia Supreme Court files, but not in the file of the Department of Offender Rehabilitation. (This latter sample, of course, permitted Baldus to analyze all penalty decisions during the period. In his analyses involving prosecutorial decisions, Baldus explained that, since a prosecutor's treatment on the first occasion inevitably would affect his disposition of the second, it could be misleading to count two dispositions of a defendant by a single decisionmaker on successive prosecutions. When two separate sentencing juries evaluated a capital defendant, however, no such problems arose. The two samples permitted both analyses to be employed throughout the CSS, as appropriate.)

After a universe had been defined and a sample drawn, Baldus began development of a new questionnaire. Since the CSS sought to examine or "model" decisions made much earlier in the charging and sentencing process than those examined in the PRS, additional questions had to be devised to gather information on such matters as the plea bargaining process and jury conviction trials. A second major area of expansion was the effort to obtain information on the strength of the evidence, an especially

important factor since this study included cases originally charged as murders which resulted in pleas or convictions for manslaughter. Professor Baldus devised these strength-of-evidence questions after a thorough review of the professional literature and consultation with other experts who had also worked in this area. The final CSS questionnaires (see DB 38) also included additional variables on a defendant's prior record and other aggravating and mitigating factors suggested by professional colleagues, by attorneys and by preliminary evaluation of the PRS questionnaires.

b. Data Collection for CSS

Data for the CSS were collected from essentially the same sources used for the PRS: the Department of Pardons and Paroles, the Deparment of Offender Rehabilitation (see DB 40), the Supreme Court of Georgia, the Bureau of Vital Statistics (see DB 47), supplemented by limited inquiries to individual attorneys to obtain information on whether plea bargains occurred, whether penalty trials occurred, and the status (retained or appointed) of defense counsel (see DB 45, at 3-6; DB 46) (see generally DB 39).

Physical coding of the CSS questionnaires was completed directly from the official records in Georgia by five law students working under the supervision of Edward Gates, who had been one of Baldus' two coders for the PRS in Georgia in 1980. The five students were selected by Baldus after a nationwide recruitment effort at 30 law schools; once again, Baldus

or Gates contacted references of the strongest candidates before hiring decisions were made (see DB 42).

As in the PRS, an elaborate written protocol to govern data entries was written, explained to the coders, and updated as questions arose. (See DB 43.) After a week-long training session in Atlanta under the supervision of Professor Baldus, Gates and the law students remained in contact with Baldus throughout the summer to resolve issues and questions that arose.

B. Edward Gates

At this point during the evidentiary hearing, petitioner presented the testimony of Edward Gates who, as indicated above, was integrally involved in data collection efforts both in the PRS and in the CSS. Gates testified that he was a 1977 graduate of Yale University, with a Bachelor of Science degree in biology. Following his undergraduate training, Gates worked as a research assistant in the Cancer Research Laboratory of Tufts Medical School, developing data sets on cellular manipulation experiments, recording his observations and making measurements to be used in this medical research. (See EG 1.)

1. Data Collection for PRS

Gates testified that he was hired by Professor Baldus in August of 1980 to collect data for the PRS. Prior to travelling to Georgia, he was sent coding instructions and practice questionnaires to permit him to begin his training. During mid-

September, 1980, he met with Baldus in Atlanta, reviewed the practice questionnaires, and met with records officials in the Georgia Archives (where Supreme Court records were stored) and in the Department of Pardons and Paroles. After several additional days of training and coding practice, he worked at the Archives each workday from mid-September until late October, 1980, reviewing trial transcripts, appellate briefs, trial judges's reports, and Supreme Court opinions before preparing abstracts and a narrative summary.

Gates testified that he followed the written coding procedures throughout, and that problems or inconsistencies were discussed with Professor Baldus each day at 4:00 p.m. When changes in coding procedures were made, Gates testified that he checked previously coded questionnaires to ensure consistent application of the new protocols.

In late October, coding work moved from the Archives to the Pardons and Paroles offices. There, Gates had access to police report summaries completed by Pardons and Paroles investigators, Federal Bureau of Investigation "rap sheets," field investigator reports on each defendant, and sometimes actual police or witness statements. Gates pointed out an illustrative example of a case he had coded (see DB 34) and reviewed at length the coding decisions he made in that case, one of over 200 he coded employing the Procedural Reform Study questionnaire. In response to questioning from the court, Gates explained that his instructions in coding the PRS questionnaire were to draw

reasonable inferences from the file in completing the foils. (These instructions later were altered, Gates noted, for purposes of the coding of the CSS questionnaire.)

Gates left Georgia in mid-January of 1981; he completed the final PRS questionnaires during the summer of 1981, during his tenure as supervisor of the CSS data collection effort in Atlanta.

2. Data Collection for CSS

During early 1981, Gates was invited by Professor Baldus to serve as project supervisor of the CSS data collection effort. In the spring of 1981, he worked extensively with Baldus on a draft of the CSS questionnaire, assisted in hiring the coders for the 1981 project, and drafted a set of written instructions for the coders (see DB 4).

Gates came to Georgia in late May of 1981, participated with Professor Baldus in a week-long training session with the five law student coders, and then supervised their performance throughout the summer. He reviewed personally the files and questionnaries in each of the first one hundred cases coded by the students, to ensure consistency, and thereafter he regularly reviewed at least one case each day for each coder. At least twice during the summer, Gates gave all coders the same file and asked them to code and cross-check the results with those completed by the other coders. Gates spoke frequently by telephone with Baldus and discussed problems that arose in interpretation on a daily basis. As in earlier collection

efforts, the protocols resolving questions of interpretation were reduced to written form, the final end-of-summer draft of which is incorporated in DB 43 (EG 5). Gates testified that he made great efforts to ensure that all questionnaires were coded consistently, revising all previous coded questionnaires when a disputed issue was subsequently resolved.

Gates noted that for the CSS questionnaire, coders were given far less leeway than in the PRS to draw inferences from the record. Moreover, in the event of unresolved conflicting statements, they were instructed to code in a manner that would support the legitimacy of the conviction and sentence imposed in the case.

In sum, Gates testified that while the data for the PRS was very carefully coded, the data effort for the CSS was even more thoroughly entered, checked and reviewed. Both data collection efforts followed high standards of data collection, with rigorous efforts made to insure accuracy and consistency.

C. Professor David Baldus (resumed)

1. Data Entry and Cleaning for CSS

Upon receipt of six boxes of completed CSS questionnaires at the end of August, 1981, Professor Baldus testified that he faced five principal tasks before data analysis could begin. The first was to complete collection of any missing data, especially concerning the race of the victim, the occurrence of a plea bargain, and the occurrence of a penalty trial in life-sentenced cases. As in the PRS study, he accomplished this

task through inquiries directed to the Bureau of Vital Statistics (see DB 47) and to counsel in the cases (see DB 45-46). His second task was the entry of the data onto magnetic computer tapes, a responsibility performed under contract by the Laboratory for Political Science. The program director subsequently reported to Professor Baldus that, as as result of the careful data entry procedures employed, including a special program that immediately identified the entry of any unauthorized code, the error remaining in the data base as a result of the data entry process is estimated to be less than 1/6 of 1 percent, and that the procedures he had followed conform to accepted social science data entry practices.

Baldus' third task was to merge magnetic tapes created by the Political Science Laboratory, which contained the data collected by his coders in Georgia, with the magnetic tapes provided by the Department of Offender Rehabilitation, which contained personal data on each offender. This was accomplished through development of a computer program under the supervision of Professor Woodworth. Next, Professors Baldus and Woodworth engaged in an extensive data "cleaning" process, attempting through various techniques -- crosschecking between the PRS and CSS files, manually comparing entries with the case summaries, completing crosstabular computer runs for consistency between two logically related variables -- to identify any coding errors in the data. Of course, upon identification,

Baldus entered a program to correct the errors. (See DB 51).[17]

The final step preceding analysis was the "recoding" of variables from the format in which they appeared on the CSS questionnaire into a binary form appropriate for machine analysis. Professor Baldus performed this recoding (see DB 54, DB 55), limiting the study to 230+ recoded variables considered relevant for an assessment of the question at issue: whether Georgia's charging and sentencing system might be affected by racial factors.

2. Methods of Analysis

As the data was being collected and entered, Professor Baldus testified that he developed a general strategy of analysis. First, he would determine the patterns of homicides in Georgia and any disparities in the rate of imposition of death sentence by race. Then he would examine a series of alternative hypotheses that might explain any apparent racial disparities. Among these hypotheses were that any apparent disparities could be accounted for: (i) by the presence or absence of one or more statutory aggravating circumstances; (ii) by the presence or absence of mitigating circumstances; (iii) by the strength of the evidence in the different cases; (iv) by the particular time period during which the sentences were imposed; (v) by the geographical area (urban or rural) in which the sentences were imposed; (vi) by whether judges or juries imposed sentence;

17/ Among the approximately 500,000 total entries in the CSS study, Professor Baldus testified that he found and corrected a total of perhaps 200 errors.

(vii) by the stage of the charging and sentencing system at which different cases were disposed; (viii) by other, less clearly anticipated, but nevertheless influential factors or combinations of factors; or (ix) by chance.

Professor Baldus also reasoned that if any racial disparities survived analysis by a variety of statistical techniques, employing a variety of measurements, directed at a number of different decision-points, principles of "triangulation" would leave him with great confidence that such disparities were real, persistent features of the Georgia system, rather than statistical artifacts conditioned by a narrow set of assumptions or conditions.

For these related reasons, Professor Baldus and his colleagues proposed to subject their data to a wide variety of analyses, attentive throughout to whether any racial disparities remained stable.

3. Analysis of Racial Disparities

a. Unadjusted Measures of Disparities

Before subjecting his data to rigorous statistical analyses, Professor Baldus spent time developing a sense for the basic, unadjusted parameters of his data which could thereby inform his later analysis. He first examined the overall homicide and death sentencing rates during the 1974-1979 period (see DB 57),[18/] the disposition of homicide cases at

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18/ Unless otherwise indicated, the Baldus exhibits reflect data from the CSS.

successive stages of the charging and sentencing process (see DB 58; DB 59) and the frequency distraction of each of the CSS variables among his universe of cases (see DB 60).

Next, Baldus did unadjusted analyses to determine whether the race-of-victim and race-of-defendant disparities reported by earlier researchers in Georgia would be reflected in his data as well. In fact, marked disparities did appear: while death sentences were imposed in 11 percent of white victim cases, death sentences were imposed in only 1 percent of black victim cases, a 10 point unadjusted disparity (see DB 62). While a slightly higher percentage of white defendants received death sentences than black defendants (.07 vs. .04) (id.), when the victim/offender racial combinations were separated out, the pattern consistently reported by earlier researchers appeared:

Black Def./ White Vic.	White Def./ White Vic.	Black Def./ Black Vic.	White Def./ Black Vic.
.22 (50/228)	.08 (58/745)	.01 (18/1438)	.03 (2/64)

b. Adjusted Measures of Disparities

Baldus testified, of course, that he was well aware that these unadjusted racial disparities alone could not decisively answer the question whether racial factors in fact play a real and persistent part in the Georgia capital sentencing system. To answer that question, a variety of additional explanatory factors would have to be considered as well. Baldus illustrated this point by observing that although the unadjusted impact of the presence or absence of the "(b)(8)" aggravating

circumstance[19] on the likelihood of a death sentence appeared to be 23 points (see DB 61), simultaneous consideration or "control" for both (b)(8) and a single additional factor -- the presence or absence of the "(b)(10)" statutory factor[20] -- reduced the disparities reported for the (b)(8) factor from .23 to .04 in cases with (b)(10) present, and to -.03 in cases without the (b)(10) factor. (See DB 64.)

Baldus explained that another way to measure the impact of a factor such as (b)(8) was by its coefficient in a least squares regression. That coefficient would reflect the average of the disparities within each of the separate subcategories, or cells (here two cells, one with the (b)(10) factor present, and one with (b)(10) absent). (See DB 64; DB 65.) Still another measure of the impact of the factor would be by the use of logistic regression procedures, which would produce both a difficult-to-interpret coefficient and a more simply understood "death odds multiplier," derived directly from the logistic coefficient, which would reflect the extent to which the presence of a particular factor, here (b)(8), might multiply the odds that a case would receive a death sentence.[21] Baldus testi..ed that,

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19/ O.C.G.A. § 17-10-30.(b)(8) denominates the murder of a peace officer in the performance of his duties as an aggravating circumstance.

20/ O.C.G.A. § 17-10-30.(b)(10) denominates murder committed to avoid arrest as an aggravated murder.

21/ DB 64 reflects that the least squares coefficient for the (b)(8) factor was .02, the logistic coefficient was -.03, and the "death odds" multiplier was .97.

by means of regular and widely-accepted statistical calculations, these measures could be employed so as to assess the independent impact of a particular variable while controlling simultaneously for a multitude of separate additional variables.

Armed with these tools to measure the impact of a variable after controlling simultaneously for the effects of other variables, Professor Baldus began a series of analyses involving the race of the victim and the race of the defendant -- first controlling only for the presence or absence of the other racial factor (see DB 69; DB 70), then controlling for the presence or absence of a felony murder circumstance (see DB 71; DB 72; DB 73), then controlling for the presence or absence of a serious prior record (see DB 74), then controlling simultaneously for felony murder and prior record (see DB 77), and finally controlling simultaneously for nine statutory aggravating circumstances as well as prior record (see DB 78). In all these analyses, Baldus found that the race of the victim continued to play a substantial, independent role, and the race of the defendant played a lesser, somewhat more marginal, but not insignificant role as well. 22/

22/ Professor Baldus testified concerning another important measure which affected the evaluation of his findings -- the measure of statistical significance. Expressed in parentheses throughout his tables and figures in terms of "p" values, (with a p-value of.10 or less being conventionally accepted as "marginally significant," a p-value of .05 accepted as "significant," and a p-value of .01 or less accepted as "highly statisticaly significant"), this measure p computes the likelihood that, if in the universe as a whole no real differences exist, the reported differences could have been derived purely by chance. Baldus explained that a p-value of .05 means that only one time in twenty could a reported disparity have been derived by chance if, in fact, in the universe of cases, no such disparity existed. A p-value of .01 would reflect a one-in-one hundred likelihood, a p-value of .10 a ten-in-one hundred likelihood, that chance alone could explain the reported disparity.

Having testified to these preliminary findings, P
Baldus turned then to a series of more rigorous analy
petitioner expressly contended to the court were responsive to the criteria set forth by the Circuit Court in Smith v. Balkcom, 671 F.2d 858 (5th Cir. Unit B 1982) (on rehearing.). In the first of these (DB 79), Baldus found that when he took into account or controlled simultaneously for all of Georgia's statutory aggravating circumstances, as well as for 75 additional mitigating factors, both the race of the victim and the race of the defendant played a significant independent role in the determination of the likelihood of a death sentence. Measured in a weighted least squares regression analysis,[23/] race of victim displays a .10 point coefficient, a result very highly statistically significant at the 1-in-1000 level. The logistic coefficient and the death odds multiplier of 8.2 are also very highly statistically significant. The race of defendant effect measured by least squares regression was .07, highly statistically significant at the 1-in-100 level; employing logistic measures, however, the race of defendant coefficient was not statistically significant, and the death odds multiplier was 1.4.

23/ Because the stratified CSS sample required weighting under accepted statistical techniques, a weighted least squares regression result is reflected. As an alternative measurement, Professor Baldus performed the logistic regression here on the unweighted data. Both measures show significant disparities.

Professor Baldus next reported the race-of-victim and defendant effects measured after adjustment or control for a graduated series of other factors, from none at all, to over 230 factors -- related to the crime, the defendant, the victim, co-perpetrators as well as the strength of the evidence -- simultaneously. (See DB 80.)[24/] Professor Baldus emphasized that as controls were imposed for additional factors, although the measure of the race-of-victim effect diminished slightly from .10 to .06, it remained persistent and highly statistically significant in each analysis. The race of defendant impact, although more unstable, nevertheless reflected a .06 impact in the analysis which controlled for 230+ factors simultaneously, highly significant at the 1-in-100 level.

Professor Baldus attempted to clarify the significance of these numbers by comparing the coefficients of the race-of-victim and race-of-defendant factors with those of other important factors relevant to capital sentencing decisions. Exhibit DB 81 reflects that the race of the victim factor, measured by weighted least squares regression methods, plays a role in capital sentencing decisions in Georgia as significant as the (i) presence or absence of a prior record of murder, armed robbery or rape (a statutory aggravating circumstance -- (b)(1)); (ii) whether the defendant was the prime mover in planning the homicide, and plays a role virtually as

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24/ This latter analysis controls for every recoded variable used by Professor Baldus in the CSS analyses, all of which are identified at DB 60.

significant as two other statutory aggravating circumstances (the murder was committed to avoid arrest -- (b)(10) -- and the defendant was a prisoner or an escapee -- (b)(9)). The race of defendant, though slightly less important, yet appears a more significant factor than whether the victim was a stranger or an acquaintance, whether the defendant was under 17 years of age, or whether the defendant had a history of alcohol or drug abuse. The comparable logistic regression measures reported in DB 82, while varying in detail, tell the same story: the race of the victim, and to a lesser extent the race of the defendant, play a role in capital sentencing decisions in Georgia more significant than many widely recognized legitimate factors. The race of the victim indeed plays a role as important as many of Georgia's ten statutory aggravating circumstances in determining which defendants will receive a death sentence.

With these important results at hand, Professor Baldus began a series of alternative analyses to determine whether the employment of other "models" or groupings of relevant factors might possibly diminish or eliminate the strong racial effects his data had revealed. Exhibit DB 83 reflects the results of these analyses. Whether Baldus employed his full file of recoded variables, a selection of 44 other variables most strongly associated with the likelihood of a death sentence, or selections of variables made according to other recognized

statistical techniques,[25] both the magnitude and the statistical significance of the race of the victim factor remained remarkably stable and persistent. (The race of the defendant factor, as in earlier analyses, was more unstable; although strong in the least squares analyses, it virtually disappeared in the logistic analyses.)

Baldus next, in a series of analyses (see DB 85- DB 87) examined the race-of-victim and defendant effects within the subcategories of homicide accompanied by one of the two statutory aggravating factors, -- (b)(2), contemporaneous felony, or (b)(7), horrible or inhuman -- which are present in the vast majority of all homicides that received a death sentence (see DB 84). These analyses confirmed that within the subcategories of homicide most represented on Georgia's Death Row, the same racial influences persist, irrespective of the other factors controlled for simultaneously (see DB 85). Among the various subgroups of (b)(2) cases, subdivided further according to the kind of accompanying felony, the racial factors continue to play a role. (See DB 86; DB 87.)

25/ Two of Professor Baldus' analyses involved the use of step-wise regressions, in which a model is constructed by mechanically selecting, in successive "steps," the single factor which has the most significant impact on the death-sentencing outcome, and then the most significant remaining factor with the first, most significant factor removed. Baldus performed this step-wise analysis using both least squares and logistic regressions. Baldus also performed a factor analysis, in which the information coded in his variables is recombined into different "mathematical factors" to reduce the possibility that multicolinearity among closely related variables may be distorting the true effect of the racial factors.

Professor Baldus then described yet another method of analysis of the racial factors -- this method directly responsive to respondent's unsupported suggestion that the disproportionate death-sentencing rates among white victim cases can be explained by the fact that such cases are systematicaly more aggravated. To examine this suggesstion, Baldus divided all of the CSS cases into eight, roughly equally-sized groups, based upon their overall levels of aggravation as measured by an aggravation-mitigation index.[26/] Baldus observed that in the less-aggravated categories, no race-of-victim or defendant disparities were found, since virtually no one received a death sentence. Among the three most aggravated groups of homicides, however, where a death sentence became a possibility, strong race-of-victim disparities, and weaker, but marginally significant race-of-defendant disparities, emerged. (See DB 89.)

Baldus refined this analysis by dividing the 500 most aggravated cases into 8 subgroups according to his aggravation/mitigation index. Among these 500 cases, the race-of-victim disparities were most dramatic in the mid-range of cases, those neither highly aggravated nor least aggravated where the latitude for the exercise of sentencing discretion was the greatest. (See DB 90.) While death sentencing rates climbed overall as the cases became more aggravated, especially victims within the groups of the cases involving black defendants, such as petitioner McCleskey, the race-of-victim disparities in the mid-range

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26/ Baldus noted that a similar method of analysis was a prominent feature of the National Halothane Study.

reflected substantial race-of-victim disparities:

Category	Black Def. White Vic.	Black Def. Black Vic.
3	.30 (3/10)	.11 (2/18)
4	.23 (3/13)	.0 (0/15)
5	.35 (9/26)	.17 (2/12/)
6	.38 (3/8)	.05 (1/20)
7	.64 (9/14)	.39 (5/13)

(DB 90.)

Race of <u>defendant</u> disparities, at least in white victim cases, were also substantial, with black defendants involved in homicides of white victims substantially more likely than white defendants to receive a death sentence.

Category	White Vic. Black Def.	White Vic. White Def.
3	.30 (3/10)	.03 (1/39)
4	.23 (3/13)	.04 (1/29)
5	.35 (9/26)	.20 (4/20)
6	.38 (3/8)	.16 (5/32)
7	.64 (9/14)	.39 (5/39)

(DB 91.)

These results, Professor Baldus suggested, not only support the hypothesis that racial factors play a significant role in Georgia's capital sentencing system, but they conform to the "liberation hypothesis" set forth in Kalven & Zeisel's The American Jury.[27/] That hypothesis proposes that illegitimate sentencing considerations are most likely to come into play where the discretion afforded the decisionmaker is greatest, i.e., where the facts are neither so overwhelmingly strong nor so weak that the sentencing outcome is foreordained.

4. Racial Disparities at Different Procedural Stages

Another central issue of Professor Baldus' analysis, one made possible by the comprehensive data obtained in the CSS, was his effort to follow indicted murder cases through the charging and sentencing system, to determine at what procedural points the racial disparities manifested themselves. Baldus observed at the outset that, as expected, the proportion of white victim cases rose sharply as the cases advanced through the system, from 39 percent at indictment to 84 percent at death-sentencing, while the black defendant/white victim proportion rose even faster, from 9 percent to 39 percent. (See DB 93.) The two most significant points affecting these changes were the prosecutor's decision on whether or not to permit a plea to voluntary manslaughter, and the prosecutor's decision, among convicted cases, of who to take on to a sentencing trial. (See DB 94.)

27/ H. KALVEN & H. ZEISEL, THE AMERICAN JURY 164-67 (1966).

The race-of-victim disparities for the prosecutor's decision on whether to seek a penalty trial are particularly striking, consistently substantial and very highly statistically significant in both the PRS and the CSS, irrespective of the number of variables or the model used to analyze the decision (see DB 95). The race-of-defendant disparities at this procedural stage were substantial in the CSS, though relatively minor and not statistically significant in the PRS. (Id.) Logistic regression analysis reflects a similar pattern of disparities in both the CSS and the PRS. (see DB 96.).

5. Analysis of Other Rival Hypotheses

Professor Baldus then reported seriatim on a number of different alternative hypotheses that might have been thought likely to reduce or eliminate Georgia's persistent racial disparities. All were analyzed; none had any significant effects. Baldus first hypothesized that appellate sentence review by the Georgia Supreme Court might eliminate the disparities. Yet while the coefficients were slightly reduced and the statistical significance measures dropped somewhat after appellate review, most models (apart from the stepwise regression models) continued to reflect real and significant race-of-victim disparities and somewhat less consistent, but observable race-of-defendant effects as well.

Baldus next hypothesized that the disparities do not reflect substantial changes or improvements that may have occurred in the Georgia system between 1974 and 1979. Yet when the cases were subdivided by two-year periods, although some minor fluctuations were observable, the disparities in the 1978-1979 period were almost identical to those in 1974-1975. (See. DB 103.) An urban-rural breakdown, undertaken to see whether different sentencing rates in different regions might produce a false impression of disparities despite evenhanded treatment within each region, produced instead evidence of racial disparities in both areas, (although stronger racial effects appeared to be present in rural areas (See DB 104.)) Finally, no discernable difference developed when sentencing decisions by juries alone were compared with decisions from by sentencing judges and juries. (See DB 105.)

6. Fulton County Data

Professor Baldus testified that, at the request of petitioner, he conducted a series of further analyses on data drawn from Fulton County, where petitioner was convicted and sentenced. The purpose of the analyses was to determine whether or not the racial factors so clearly a part of the statewide capital sentencing system played a part in sentencing patterns in Fulton County as well., Since the smaller universe of Fulton County cases placed some inherent limits upon the statistical operations that could be conducted, Professor Baldus supplemented these statistical analyses with two "qualitative" studies: (i) a "near

neighbors' analysis of the treatment of other cases at a level of aggravation similar to that of petitioner; and (recognizing that petitioner's victim has been a police officer) an analysis of the treatment of other police victim cases in Fulton County.

a. Analysis of Statistical Disparities

Professor Baldus began his statistical analysis by observing the unadjusted disparities in treatment by victim/defendant-racial combinations at six separate decision points in Fulton County's charging and sentencing system. The results show an overall pattern roughly similar to the statewide pattern:

Black Def. White Vic.	White Def. White Vic.	Black Def. Black Vic.	White Def. Black Vic.
.06 (3/52)	.05 (5/108)	.005 (2/412)	.0 (0/8)

(DB 106.) The unadjusted figures also suggest (i) a greater willingness by prosecutors to permit defendants to plead to voluntary manslaughter in black victim cases, (ii) a greater likelihood of receiving a conviction for murder in white victim cases, and (iii) a sharply higher death sentencing rate for white victim cases among cases advancing to a penalty phase. (DB 106; DB 107.) When Professor Baldus controlled for the presence or absence of each of Georgia's statutory aggravating circumstances separately, he found very clear patterns of race-of-victim disparities among those case categories in which death sentences were most frequently imposed (DB 108). Among (b)(2) and (b)(8) cases -- two aggravating cirstances present in petitioner's own

case -- the race-of-victim disparities were .09 and .20 respectively (although the number of (b)(8) cases was too small to support a broad inference of discrimination).

When Professor Baldus controlled simultaneously for a host of variables, including 9 statutory aggravating circumstances, a large number of mitigating circumstances, and factors related to both the crime and the defendant (see DB 114 n.1 and DB 96A, Schedule 3), strong and highly statistically significant race-of-victim disparities were evident in both the decision of prosecutors to accept a plea (-.55, p=.0001) and the decision to advance a case to a penalty trial after conviction (.20, p=.01) (DB 114). Race-of-defendant disparities were also substantial and statistically significant at the plea stage (-.40, p=.01) and at the stage where the prosecutor must decide whether to advance a case to a penalty trial (.19, p=.02) (DB 114). These racial disparities in fact, were even stronger in Fulton County than they were statewide.

Although the <u>combined</u> affects of all decision-points in this analysis for Fulton County did not display significant racial effects, Professor Baldus suggested that this was likely explained by the very small number of death-sentenced cases in Fulton County, which made precise statistical judgments on overall impact more difficult.

b. "Near Neighbors" Analysis

Aware of the limits that this small universe of cases would impose on a full statistical analysis of Fulton County data, Professor Baldus undertook a qualitative analysis of those cases in Fulton County with a similar level of aggravation to petitioner -- the "near neighbors." Baldus identified these neighboring cases by creating an index through a multiple regression analysis of those non-suspect factors most predictive of the likelihood of a death sentence statewide. Baldus then rank-ordered all Fulton County cases by means of this index, and identified the group of cases nearest to petitioner. He then broke these cases, 32 in all, into three subgroups -- more aggravated, typical, and less aggravated -- based upon a qualitative analysis of the case summaries in these 32 cases. Among these three subgroups, he calculated the death-sentencing rates by race-of-victim. As in the statewide patterns, no disparities existed in the less aggravated subcategory, since no death sentences were imposed there at all. In the "typical" and "more aggravated" subcategories, however, race-of-victim disparities of .40 and .42 respectively, appeared. (See DB 109; DB 110.) Professor Baldus testified that this near neighbors analysis strongly reinforced the evidence from the unadjusted figures that racial disparities, especially by race-of-victim, are at work not only statewide, but in Fulton County as well.

c. Police Homicides

Professor Baldus' final Fulton County analysis looked at the disposition of 10 police-victim homicides, involving 18 defendants, in Fulton County since 1973. (See DB 115.) Among these 18 potential cases, petitioner alone received a death sentence.[28/] Professor Baldus divided 17 of the cases into two subgroups, one subgroup of ten designated as "less aggravated," the other subgroup of seven designated as "aggravated." (See DB 116.) The "aggravated" cases were defined to include triggerpersons who had committed a serious contemporaneous offense during the homicide. Among the seven aggravated cases, three were permitted to plead guilty and two were convicted, but the prosecutor decided not to advance the cases to a penalty trial. Two additional cases involved convictions advanced to a penalty trial. In one of the two, petitioner's case, involving a white officer, a death sentence was imposed; in the other case, involving a black officer, a life sentence was imposed.

Although Professor Baldus was reluctant to draw any broad inference from this analysis of a handful of cases, he did note that this low death-sentencing rate for police-victim cases in Fulton County paralleled the statewide pattern. Moreover, the results of this analysis were clearly consistent with petitioner's overall hypothesis.

28/ One defendant, treated as mentally deranged by the system, was not included in the analysis.

7. Professor Baldus' Conclusions

In response to questions posed by petitioner's counsel (see DB 12), Professor Baldus offered his expert opinion -- in reliance upon his own extensive analyses of the PRS and CSS studies, as well as his extensive review of the data, research and conclusions of other researchers -- that sentencing disparities do exist in the State of Georgia based upon the race of the victim, that these disparities persist even when Georgia statutory aggravating factors, non-statutory aggravating factors, mitigating factors, and measures of the strength of the evidence are simultaneously taken into account. Professor Baldus further testified that these race-of-victim factors are evident at crucial stages in the charging and sentencing process of Fulton County as well, and that he has concluded that these factors have a real and significant impact on the imposition of death sentences in Georgia.

Professor Baldus also addressed the significance of the race-of-defendant factor. While he testified that it was not nearly so strong and persistent as the race of the victim, he noted that it did display some marginal effects overall, and that the black defendant/white victim racial combination appeared to have some real impact on sentencing decisions as well.

D. Dr. George Woodworth

1. Area of Expertise

Petitioner's second expert witness was Dr. George Woodworth, Associate Professor of Statistics and Director of the Statistical Consulting Center at the University of Iowa. Dr. Woodworth testified that he received graduate training as a theoretical statistician under a nationally recognized faculty at the University of Minnesota. (See GW 1.) One principal focus of his academic research during his graduate training and thereafter has been the analysis of "nonparametric" or discrete outcome data, such as that collected and analyzed in petitioner's case. After receiving his Ph.D. degree in statistics, Dr. Woodworth was offered an academic position in the Department of Statistics at Stanford University, where he first became professionally interested in applied statistical research. While at Stanford, Dr. Woodworth taught nonparametric statistical analysis, multivariate analysis and other related courses. He was also selected to conduct a comprehensive review of the statistical methodology employed in the National Halothane Study, for presentation to the National Research Council. Thereafter, upon accepting an invitation to come to the University of Iowa, Dr. Woodworth agreed to become the director of Iowa's Statistical Consulting Center, in which capacity he has reviewed and consulted as a statistician in ten to twenty empirical studies a year during the past eight years.

Dr. Woodworth has published in a number of premier refereed professional journals of statistics on nonparametric scaling tests and other questions related to his expertise in this case. He has also taught courses in the theory of probability, statistical computation, applied statistics, and experimental design and methodology. In his research and consulting work, Dr. Woodworth has had extensive experience in the use of computers for computer-assisted statistical analysis.

After hearing his credentials, the Court qualified Dr. Woodworth as an expert in the theory and application of statistics and in statistical computation, especially of discrete outcome data such as that analyzed in the studies before the Court.

2. Responsibilities in the PRS

Dr. Woodworth testified that he worked closely with Professor Baldus in devising statistically valid and acceptable procedures for the selection of a universe of cases for inclusion in the PRS. Dr. Woodworth also reviewed the procedures governing the selection of cases to be included in the three subgroups on which data were collected at different times and with different instruments to ensure that acceptable principles of random case selection were employed.

Dr. Woodworth next oversaw the conversion of the data received from the PRS coders into a form suitable for statistical analysis, and he merged the several separate data sets into one

comprehensive file, carefully following established statistical and computer procedures. Dr. Woodworth also assisted in the cleaning of the PRS data, using computer techniques to uncover possible errors in the coding of the data.

3. CSS Sampling Plan

Dr. Woodworth's next principal responsibility was the design of the sampling plan for the CSS, including the development of appropriate weighting techniques for the stratified design. In designing the sample, Dr. Woodworth consulted with Dr. Leon Burmeister, a leading national specialist in sampling procedures. Dr. Burmeister approved the CSS design, which Dr. Woodworth found to have employed valid and statistically acceptable procedures throughout. Dr. Woodworth explained in detail how the sample was drawn, and how the weights for analysis of the CSS data were calculated, referring to the Appendices to GW 2 (see GW 2, pp. 5ff.)

4. Selection of Statistical Techniques

Dr. Woodworth testified that he employed accepted statistical and computer techniques in merging the various data files collected for the CSS, and in assisting in the data cleaning efforts which followed.

Dr. Woodworth also made the final decision on the appropriate statistical methods to be employed in the analysis of the CSS and PRS data. He testified at length concerning the

statistical assumptions involved in the use of weighted and unweighted least squares regressions, logistic regressions and index methods, and gave his professional opinion that each of those methods was properly employed in these analyses according to accepted statistical conventions. In particular, Dr. Woodworth observed that while certain assumptions of least squares analysis appeared inappropriate to the data in these studies -- especially the assumption that any racial effects would exercise a constant influence across the full range of cases -- the use of that method did not distort the effects reported in the analyses, and its use allowed consideration of helpful and unbiased information about the racial effects. Moreover, Dr. Woodworth noted that the alternative analyses which employed logistic regressions -- a form of regression analysis dependent upon assumptions closely conforming to the patterns of data observed in these studies -- also found the persistence of racial effects and showed that the use of least squares analysis could not account for the significant racial disparities observed.

5. Diagnostic Tests

Dr. Woodworth conducted a series of diagnostic tests to determine whether the methods that had been selected might have been inappropriate to the data. Table 1 of GW 4 reflects the results of those diagnostic tests, performed on five models that were used throughout the CSS analysis. For both the race of the victim and race of the defendant, Dr. Woodworth compared

coefficients under a weighted least squares regression analysis, an ordinary least squares regression analysis, a "worst case" approach (in which cases with "missing" values were systematically coded to legitimize the system and run counter to the hypotheses being tested), a weighted least squares analysis removing the most influential cases, a weighted least squares analysis accounting for possible "interactions" among variables, a weighted logistic regression analysis, and an unweighted logistic regression analysis. (GW 4, at Table 1.) Dr. Woodworth also employed a conservative technique to calculate the statistical significance of his results (see GW 3, at 6 n.1, and Schedule II, for a calculation of Cressie's safe method) and a "modified Mantel-Haenzel Procedure (see GW 3, Schedules 1 and 3) to test the logistic regressions. These various diagnostic tests did not eliminate, and in most cases did not even substantially diminish, the race-of-victim effects. The levels of statistical significance remained strong, in most instances between two and three standard deviations, even employing Cressie's conservative "safe" method to calculate significance.

Dr. Woodworth testified that, after this extensive diagnostic evalution, he was confident that the statistical procedures selected and employed in the PRS and CSS analyses were valid, and that the racial disparities found by the two studies were not produced by the use of inappropriate statistical methods or by incorrect specification of the statistical model.

6. Models of the Observed Racial Disparities

Dr. Woodworth then directed the Court's attention to two figures he had developed to summarize the overall racial disparities in death-sentencing rates identified by the CSS study, employing the "mid-range" model in which both Dr. Woodworth and Professor Baldus had expressed particular confidence. (See GW 5A and 5B.) As Dr. Woodworth explained, these figures represented the likelihood of receiving a death sentence at different levels of aggravation. Among black defendants such as petitioner (see GW 5B, Fig. 2), Dr. Woodworth noted that the death-sentencing rate in Georgia rises far more precipitously for white victim cases as aggravation levels increase than does the rate for black victim cases. For example, Dr. Woodworth observed, at the .4 level of aggravation, those black defendants who had killed white victims were exposed to a .15 point higher likelihood of receiving a death sentence. A similar disparity, based upon race of the victim, obtained among white defendants. (See GW 5A, Fig. 1.)

From these figures, Dr. Woodworth concluded that although white victim cases as a group are more aggravated than black victim cases, strong racial disparities exist in Georgia even when only those cases at similar levels of aggravation are compared.

E. Lewis Slayton Deposition

Petitioner offered, and the Court admitted pursuant to Rule 7 of the Rules Governing Section 2254 Cases, a transcript of the deposition of Lewis Slayton, the District Attorney for the Atlanta Judicial Circuit. In his deposition, while District Attorney Slayton stated several times that race did not play a role in sentencing decisions (Dep., at 78), he acknowledged that his office had no express written or unwritten policies or guidelines to govern the disposition of homicide cases at the indictment stage (Dep., 10-12), the plea stage, (Dep., at 26) or the penalty stage (Dep., 31, 41, 58-59). Moreover, murder cases in his office are assigned at different stages to one of a dozen or more assistant district attorneys (Dep., 15, 45-48), and there is no one person who invariably reviews all decisions on homicide dispositions (Dep., 12-14, 20-22, 28, 34-38). Slayton also agreed that his office does not always seek a sentencing trial in a capital case, even when statutory aggravating circumstances are present (Dep., 38-39). Slayton testified further that the decisionmaking process in his office for seeking a death sentence is "probably ... the same" as it was in the pre-Furman period (Dep., 59-61), and that the jury's likely verdict influences whether or not a case will move from conviction to a penalty trial (Dep. 31, 38-39).

F. Other Evidence

Petitioner offered the testimony of L. G. Warr, a parole officer employed by the Georgia Board of Pardons and Paroles.

Officer Warr acknowledged that in preparing the Parole Board reports used by Professor Baldus in his study, parole investigators were obligated by statute and by the Board Manual of Procedure in all murder cases to speak with the prosecuting attorney and police officers if possible, soliciting records, witness interviews and other sources of information, including comments from the prosecutor not reflected in any written document or file. The Manual instructs investigators that it is imperative in cases involving personal violence to obtain information on all aggravating and mitigating circumstances. The portions of the Manual admitted as LW 1 confirm Officer Warr's testimony.

Petitioner also introduced testimony from petitioner's sister, Betty Myer, that petitioner's trial jury included eleven whites and one black.

Finally, petitioner proffered a written report by Samuel Gross and Robert Mauro on charging and sentencing patterns in Georgia which was refused by the Court in the absence of live testimony from either of the report's authors.

II. Respondent's Case

Respondent offered the testimony of two expert witnesses, Dr. Joseph Katz and Dr. Roger Burford.

A. Dr. Joseph Katz

1. Areas of Expertise

Dr. Katz testified that he had received bachelors degrees

in mathematics and computer science from Louisiana State University. Katz received a Master degree in Mathematics and a Ph.D. degree in Quantitative Methods from L.S.U. A major focus of his professional research has been on input-output multiplier models used in the projection of economic developments by experts interested in regional growth. Dr Katz has taught various courses in basic statistics, operations research and linear programming in the Department of Quantitative Methods at L.S.U., in the Department of Management Information Sciences at the University of Arizona, and in the Department of Quantitative Methods at Georgia State University, where he is currently an Assistant Professor. Dr. Katz has published a number of articles on input-output multipliers in several refereed journals of regional science.

Respondent offered Dr. Katz as an expert on statistics, statistical analysis, quantitative methods, analysis of data, and research design. On voir dire, Dr. Katz acknowledged that he had no expertise at all in criminal justice or in the application of statistics to criminal justice issues. Dr. Katz was unfamiliar with any literature or research in the area. (Counsel for the State expressly conceded that the State was not offering Dr. Katz to shed light in the criminal justice area.)

Moreover, Dr. Katz has only one prior academic or professional experience in the design of empirical research or the collection of empirical data -- and that one experience involved the gathering of Census data from library sources. He acknowledged having taken no academic course in multivariate analysis.

Upon completion of voir dire, the Court agreed to accept Dr. Katz as an expert in statistics. The Court declined to qualify him as an expert in criminal justice, research design, or empirical research.

2. Critiques of Petitioner's Studies

a. Use of Foil Method

Over petitioner's objection predicated on his lack of expertise, Dr. Katz was permitted to testify that the use of the foil method of data entry for some of the PRS variables might have resulted in the loss of some information in those instances in which there were insufficient foils. The foil method also prevented a coder from reflecting completely certain data because of the arrangement of several of the foils.

Dr. Katz admitted that the CSS questionnaire, which largely avoided any foil entries, was an improvement over the PRS questionnaires, although Dr. Katz faulted the one or two items in the CSS which reverted to a foil approach.

b. Inconsistencies in the Data

Dr. Katz testified that he had run cross-checks of variables present in cases included in both the PRS and the CSS that appeared to be identical. These checks uncovered what seemed to Dr. Katz to be a number of "mismatches," suggesting that data may have been entered erroneously in one study, or the other, or both.

c. Treatment of Unknowns

Dr. Katz presented several tables showing what he described

as "missing values." In his judgment, deletion of all cases with such missing values was necessary, thereby rendering any regression analysis virtually impossible.

3. Dr. Katz' Conclusion

Dr. Katz hypothesized that the apparent racial disparities reflected in the PRS and CSS research might be explained if it were shown that white victim cases generally were more aggravated than black victim cases. Dr. Katz introduced a number of tables to establish that, as a whole, white victim cases in Georgia are more aggravated than black victim cases. Dr. Katz admitted, however, that he had performed no analysis of similarly-situated black and white victim cases, controlling for the level of aggravation, nor had he performed any other analyses controlling for any variables that eliminated, or even diminished, the racial effects reported by Baldus and Woodworth.

B. Dr. Roger Burford

1. Area of Expertise

Dr. Burford testified that he was a Professor of Quantitative Methods at Louisiana State University. He was also vice-president of a private research and consulting firm that conducts economic, market and public opinion research requiring extensive use of empirical methods. In his capacity as a consultant, Dr. Burford has testified as an expert witness between 100 and 150 times.

Dr. Burford has taught courses in sampling theory, research methods, multivariate analysis, computer simulation

modelling, and linear programming. He has published three textbooks on statistics and a wide range of articles on regional economic growth, computer simulation methods, and other topics.

Petitioner stipulated to Dr. Burford's expertise in the area of statistical analysis. On voir dire, Dr. Burford admitted that apart from his participation in the statistical analysis of one jury pool, he has had virtually no professional exposure to the criminal justice system and was not qualified as an expert in this area.

2. Pitfalls in the Use of Statistical Analysis

Dr. Burford testified that his involvement in the review of the PRS and CSS studies was largely as a consultant to Dr. Katz. Dr. Burford conducted almost no independent analysis of these studies, but rather reviewed materials generated by Dr. Katz. Dr. Burford believed that Dr. Katz' approach to the PRS and CSS studies was reasonable, and testified that it "could be useful" in evaluating these studies.

The remainder of Dr. Burford's testimony focused upon the general limitations of statistical analysis. He suggested that statistics can provide evidence, but cannot constitute "proof in a strict sense." Dr. Burford warned that regression analysis can be misused, especially if the underlying data are invalid. Data sets rarely meet all of the assumptions ideally required for the use of regression analysis. Possible multicolinearity, he warned, could confound regression results, although use of factor analysis admittedly reduces

the problems of multicolinearity. Dr. Burford also cautioned that step-wise regressions can result in an overfitted model and can thus be misleading.

3. Dr. Burford's Conclusions

Dr. Burford did not offer any ultimate conclusions on the validity of the statistical methods used in the PRS and CSS studies. He did acknowledge on cross-examination that the regressions run by Baldus and Woodworth were "pretty conclusive."

III. Petitioner's Rebuttal Case

A. Professor Baldus

On rebuttal, Professor Baldus disposed of several issues raised by respondent. He first addressed the questions raised by Dr. Katz concerning certain of his coding conventions, especially the failure to distinguish in his machine analysis between items coded 1 ("expressly stated in the file") and items coded 2 ("suggested by the file") on the questionnaires. Baldus testified that to examine the effect of this challenged practice, he had completed additional analyses in which, for 26 aggravating and mitigating variables, he recoded to make distinctions between items coded 1 and 2, rather than collapsing the two categories into one. He found that the distinctions had no effect on the racial coefficients, and only marginally affected the level of statistical significance.

Turning to a criticism that, in multiple victim cases, information had not been coded concerning the characteristics of the second and successive victims, Professor Baldus again

testified that he had conducted supplemental analyses to consider the problem. For the eight principal victim variabl on which the questionnaires or case summaries contained suffi information, he recoded the computer for each of the 50-60 multiple victim cases, and then reran his analyses. The race-of-victim effects dropped by one-half of one percent, Baldus reported, and the race-of-defendant effects remained unchanged.

Baldus next discussed Dr. Katz' table identifying "miss values." He explained that, in his 230+ variable models, th table would reflect approximately 30 missing values per 230- variable case. Baldus noted that much of the data that trul was missing was absent, not from Baldus' own data-gathering effort, but from the magnetic tape provided by the Departmen of Offender Rehabilitation. Moreover, most of such missing related to characteristics of the defendants which had not b used in Professor Baldus' analyses in any event. Other data "missing" from one variable was in fact suppied by data pres somewhere else in the questionnaire in another variable.

More centrally, Professor Baldus testifed that his enti philosphy in the coding of unknown values, fully consistent with most of the relevant professional literature, was to assume that wherever an item was coded "unknown" or missing because of an absence of information in the files, the deci maker, prosecutor or jury, necessarily had been forced to t that factor as nonexistent. The basis for that assumption, explained, is that rational judgments normally are made upo

what is known; information not available cannot normally affect a decision. Moreover, Baldus testified that he knew of nothing to suggest any systematic bias created by missing values or unknowns that might possibly affect the racial disparities observed.

As a further safeguard on this point, however, Baldus testified about a table reporting regression results, controlling for the racial factors as well as nine statutory aggravating circumstances and prior record, in which he had deleted all cases with missing values, a method recommended by Dr. Katz. (See DB 120). The only effect of the deletions was to increase the race-of-victim coefficient by .02. The race-of-defendant coefficient remained the same, although somewhat less statistically significant (compare DB 78 with DB 120). A similar result occurred after reanalysis of the table reported in DB 121.

Baldus conducted yet another alternative analysis in which he assumed that every missing value would, if identified, run counter to his hypothesis, diminishing the racial effects. Recalculating his DB 78 under those extreme "worst case" assumptions, Baldus found that the race-of-victim coefficient did drop from .07 to .05, but it remained highly statistically significant at the 1-in-100 level. (See DB 122). The race-of-defendant coefficient dropped from .04 to .03, and remained non-significant. (See also DB 123).

To counter Dr. Katz' further suggestion that the lack of information on the race of the victim in a small number of cases might be important, Professor Baldus recoded those cases,

assigning black victim variables in death cases and white victim variables in life cases. Once again, the result of this "worst case" analysis revealed persistent race-of-victim effects, with a very high degree of statistical significance. (See DB 124).

Finally, in addressing Dr. Katz' "mismatch" tables for the PRS and CSS files, Professor Baldus observed that some of the "mismatches" simply reflected Dr. Katz' misunderstanding of differences in variable definition between the two files. Other "mismatches" occurred because Dr. Katz identified as errors certain discrepancies between the cases of co-defendants, unmindful that cases of co-defendants often reflect different or inconsistent factual versions of a single crime. In those mismatches where genuine discrepancies existed, Baldus noted, an analysis of the case summaries revealed that the error rate was higher in the PRS and lower in the CSS (on which most of the analyses relied.) Finally, Baldus noted that Dr. Katz had made no assertion that any systematic bias had been introduced by these few random errors.

B. Dr. Woodworth

1. Statistical Issues

Dr. Woodworth on rebuttal spoke to several additional minor points raised by the State. He first addressed the observation of Dr. Katz that an estimated eleven cases existed in the CSS in which penalty trials had occurred but had not been identified by Baldus' coders. Katz speculated that these eleven omissions might have adversely affected the weighting

scheme for the CSS sample. Dr. Woodworth acknowledged that eleven missing penalty trial cases would have affected the weighting scheme; however, he calculated the degree of likely impact as affecting the third decimal place of the racial coefficients (e.g., .071 vs. .074.)

Dr. Woodworth confirmed Professor Baldus' testimony that, from a statistical standpoint, the few inevitable, but insignificant errors that may have been identified by Dr. Katz' cross-matching procedures could only have affected the racial coefficient if they had been systematic, rather than random, errors.

Dr. Woodworth next addressed an implication by Dr. Katz that since the level of statistical significance of the CSS racial disparities had dropped upon the introduction of additional variables to the model, the introduction of still further variables would eliminate statistical significance entirely. Through the use of a simple figure (see GW 6), Dr. Woodworth demonstrated the fallacy in Dr. Katz' reasoning, explaining that there was no statistically valid way to predict the effect of the addition of additional variables to a model.

2. Warren McClesky's Level of Aggragation

Finally, in response to a a question posed to him by the Court on petitioner's case-in-chief, Dr. Woodworth reported that, on the aggravation scale reported at GW 5A and 5B, Warren McClesky's case fell at the .52 level (see GW8). At that level, Dr. Woodworth explained, the disparities in black defendant cases dependent upon whether the victim was white or black was approximately 22 points.

Dr. Woodworth testified that, to arrive at the best overall figure measuring the likely impact of Georgia's racial disparities on a case at petitioner's level of aggravation, he had employed a triangulation approach, using three separate measures. From GW8, he drew a measure of 22 points; from DB 90, at level 5 where petitioner's case is located, the disparity was 18 points; from Dr. Woodworth's recalculation of logistic probabilities, the disparity in the midrange model[29/] was 23 points. Dr. Woodworth noted this "almost complete convergence" suggested a measure of the racial impact in a case at petitioner's level of over 20+ percentage points.

C. Dr. Richard Berk

1. Areas of Expertise

Petitioner's final rebuttal witness was Dr. Richard Berk, Professor of Sociology at the University of California at Santa Barbara. Dr. Berk has an undergraduate degree from Yale and a Ph.D from John Hopkins University. (See RB 1.) Dr. Berk has taught courses in econometrics, statistics, and research design, and has published extensively in the areas of criminal justice statistics and sentencing issues. Dr. Berk has served as a consultant to the National Institute of Justice, to the

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29/ Both Baldus and Woodworth, as well as Dr. Burford testified that this or a similar model, which did not contain the hundreds of variables that might raise problems of multicolinearity, was probably the best model for measuring possible racial effects.

California Attorney General's Committee on Statistics, and to the counties of Baltimore and Santa Barbara, for which he has designed jury selection systems. Dr. Katz has also served on a select panel of the National Academy of Science which, during the past two years, has examined virtually every major empirical sentencing study ever conducted and formulated criteria for the conduct of such research.[30/] After hearing his testimony, the Court accepted Dr. Berk as an expert in statistics and in sociology.

2. Quality of Petitioner's Studies

Dr. Berk testified that he had received a copy of the magnetic tape containing the PRS and CSS studies some ten months prior to his testimony. During the intervening period, he had conducted some preliminary analyses on the data and had reviewed the Baldus and Woodworth preliminary report, as well as Dr. Katz' written evaluation of that report. Dr. Berk found both the PRS and CSS to be studies of "high credibility." He testified that among the hundreds of sentencing research efforts he had reviewed for the National Academy of Sciences, the Baldus and Woodworth studies were "far and away the most complete," that they employed "state of the art diagnostics," that the data quality was "very salient" -- in sum that he knew of no better published studies anywhere on any sentencing issue. Dr. Berk also commented favorably on such features of the studies as the

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30/ The report of the Special Committee has been published as RESEARCH ON SENTENCING: THE SEARCH FOR REFORM (1983).

comprehensive use of alternative statistical analyses, the computer system employed, and Baldus' assumptions about the proper treatment of "unknowns" or "missing values." Moreover, Dr. Berk testified that after reading the Katz report and hearing the testimony of Dr. Katz and Dr. Burford, he came away even more persuaded by the strength and reliability of petitioner's studies.

3. The Objections of Dr. Katz and Dr. Burford

Dr. Berk testified that he concurred with Dr. Burford's testimony listing possible pitfalls in the use of statistical analysis; however, Berk saw no evidence that the Baldus and Woodworth studies had fallen victim to any of these errors, and he did not understand Dr. Burford to have identified any serious weaknesses in either of the studies.

Turning to Dr. Katz' testimony, Dr. Berk first addressed the possible effects of multicolinearity on the racial disparities observed by Baldus. He noted that the diagnostics that had been performed by Dr. Woodworth failed to reveal serious multicolinearity in the studies, but that such effects, even if serious, could have only dampened or diminished the racial effects.

Dr. Berk faulted the logic of Dr. Katz' suggestion that the more aggravated general level of white victim cases was a plausible hypothesis to explain the racial disparities observed. He noted that the important question was how white and black victim cases were treated at similar levels of aggravation; while

Dr. Katz had not even attempted to address this latter question, petitioner's experts had done so, and he found convincing Dr. Woodworth's proof that at similar levels of aggravation, marked differences were clear in the treatment of cases by race of the victim.

Addressing Professor Baldus' coding of "unknowns," Dr. Berk observed that the National Academy of Sciences committee had discussed this very question, concluding as did Professor Baldus that the proper course was to treat unknown data as having no influence on the decisionmaker. Berk further observed, respecting the "missing data" problem, that missing data levels no greater than 10 to 15 percent of the total (the PRS and CSS figures were 6 percent or less) "almost never makes a difference" in the outcome of statistical analysis. Moreover, were such missing data having a serious effect on the studies, a predictable symptom would be a skewing or inverting of other anticipated effects, such as those of powerful determinants of sentence such as the statutory aggravating circumstances. In Baldus' studies, however, no such symptons appeared, leading Dr. Berk to discount missing data as a serious problem.

D. The Lawyer's Model

Several weeks after the August, 1983 evidentiary hearing, Professor Baldus submitted an affidavit describing in detail the results of an analysis employing a model developed by the Court, including factors selected as likely to predict whether a homicide case would receive a capital sentence. The race-of-

victim disparities reported by Professor Baldus upon completion of extensive analyses using the Lawyer's Model were fully consistent with the results presented during the evidentiary hearing:

> "There are persistent race of victim effects and when the analysis focuses on the more aggravated cases, where there is a substantial risk of a death sentence, those effects increase substantially.

Baldus Aff., at 10. See id., at 19.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-8176

WARREN McCLESKEY,

Petitioner-Appellee, and
Cross-Appellant,

vs.

WALTER D. ZANT, Superintendent,
Georgia Diagnostic & Classification Center,

Respondent-Appellant, and
Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CORRECTED BRIEF FOR PETITIONER McCLESKEY
AS APPELLEE AND CROSS-APPELLANT
ON CROSS-APPEAL (HABEAS CORPUS)

ROBERT H. STROUP
1515 Healey Building
Atlanta, Georgia 30303

JACK GREENBERG
JAMES M. NABRIT, III
JOHN CHARLES BOGER
99 Hudson Street
New York, New York 10013

TIMOTHY K. FORD
600 Pioneer Square
Seattle, Washington 98105

ANTHONY G. AMSTERDAM
New York University Law School
40 Washington Square South
New York, New York 1012

ATTORNEYS FOR PETITIONER-APPELLEE
AND CROSS-APPELLANT

CORRECTED COPY

Nevertheless, we submit that the statistical case alone is sufficient to warrant relief. This Court has recognized that "[i]n some instances, circumstantial or statistical evidence of racially disproportionate impact may be so strong that the results permit no other inference but that they are the product of a racially discriminatory intent or purpose." Smith v. Balkcom, 671 F.2d 858, 859 (5th Cir. Unit B 1982)(on rehearing); cf. Adams v. Wainwright, 709 F.2d 1443, 1449 (11th Cir. 1983). Petitioner's comprehensive statistical evidence on the operation of Georgia's capital statutes from their inception in 1973 through 1979, demonstrating substantial, pervasive disparities based upon the race of the homicide victim and the race of the defendant, constitutes just the sort of "clear pattern, unexplainable on grounds other than race," Arlington Heights v. Metropolitan Housing Authority, 429 U.S. 252 266 (1977), that the Supreme Court has held to establish an Equal Protection violation. It is to petitioner's evidence that we now turn.

B. The Facts: Petitioner Has Made Out A Compelling Prima Facie Case Of Racial Discrimination In Capital Sentencing

(i) Petitioner's Experts Were Well Qualified

The statistical case-in-chief for petitioner was pre-

17/ (continued)

Washington v. Davis, 426 U.S. 229, 265-66 (1976). Having denied petitioner access to the records from which such discriminatory acts might have been proven, moreover, (R. 596; see Fed. Hab. Tr. 1797-99), the District Court should not have faulted petitioner for failure to introduce such non-statistical evidence as part of its case-in-chief. (See R. 1141). If this Court's review of petitioner's substantial statistical evidence leaves the Court with any doubts about petitioner's prima facie claim, it should remand the case to the District Court for the receipt of this significant nonstatistical evidence.

sented through the testimony of two experts eminently qualified to investigate the very matters at issue. Professor David Baldus, petitioner's chief researcher, testified concerning his background and training in law as well as his extensive experience in the development and use of social science methods to examine legal issues. Educated in political science at Pittsburgh and in law at Columbia and Yale Law Schools (Fed. Hab. Tr. 39-42), Baldus has pursued a distinguished research and teaching career, focused upon the applications of social science methods to legal issues. His first major research effort, on the impact of certain social welfare laws, has subsequently "been reprinted in a number of books, and it's used in courses in sociology departments and in law schools to illustrate [time series] ... methodology as a way of trying to determine the impact the enactment of laws ha[s]." (Id. 52-53).18/

As a result of consultations on that first project with Professor James Cole, a statistician, Baldus began an extended research collaboration with Cole on how courts should employ statistical evidence in evaluation of claims of discrimination. (Id. 54-55). The ultimate fruit of that effort is an authoritative text in the field, D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980) (id. 68), widely relied upon by the federal courts in evaluating the quality of statistical evidence. (Fed. Hab. Tr. 74-75; see DB6).

As part of his research for that work, Baldus happened to

18/ Baldus, "Welfare as a Loan: An Empirical Study of the Recovery of Public Assistance Payments in the United States," 25 STAN. L. REV. 123 (1973).

obtain and reanalyze an extensive data set on capital punishment patterns collected in the mid-1960's by Professor Marvin Wolfgang.19/ Subsequently, Baldus also obtained and reviewed a second major data set on capital punishment patterns collected at Stanford University during the late 1950's and early 1960's. (Id.).20/ Baldus further pursued his interest in capital punishment in a critical evaluation of the methodologies employed in two key studies on the deterrent value of capital punishment, published in a special 1975 symposium on the death penalty in the Yale Law Journal.21/

After Gregg v. Georgia in 1976, Professor Baldus' research interest in capital punishment intensified into a principal focus of his work. During the succeeding seven years, Baldus devoted a major portion of his research (id. 84-100), writing (id. 85-90)22/, and teaching energies (id. 90) to the post-Gregg capital punishment statutes and their administration, reviewing every Supreme Court case on capital sentencing and studying the professional

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19/ See Wolfgang & Riedel, "Race, Judicial Discretion and the Death Penalty, 407 ANNALS 119 (1973).

20/ See Special Edition, "A Study of the California Penalty Jury in First Degree Murder Cases," 21 STAN. L. REV. 1297 (1969).

21/ Baldus & Cole, "A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment," 85 YALE L. J. 170 (1975).

22/ See DB 1 at 2; e.g., Baldus, Pulaski, Woodworth & Kyle, "Identifying Comparatively Excessive Sentences of Death," 33 STAN. L. REV. 601 (1977); Baldus, Pulaski & Woodworth, "Proportionality Review of Death Sentences: An Empirical Study of the Georgia Experience," J. CRIM. LAW & CRIMINOLOGY (forthcoming 1983).

literature on sentencing patterns in both capital and non-capital cases (id. 130-31; see DB 13) as part of his preparation for the two studies that formed the basis of petitioner's statistical case below.23/

Petitioner's other expert on his case-in-chief was Dr. George Woodworth, an Associate Professor of Statistics at the Univeristy of Iowa. Dr. Woodworth testified that he had been trained as a theoretical statistician (id. 1195), specializing in nonparametric analysis of categorical data (the very sort of data at issue in petitioner's two studies). (Id. 1197, 1200). While teaching at Stanford University, Dr. Woodworth developed an interest in applied statistics (id. 1200), and was invited by the National Research Council and its chief statistician, Frederick Mosteller, to conduct a formal review of the statistical methodology used in a major national research project (id. 1200-01) (which employed many of the methods Baldus and Woodworth ultimately incorporated into their own studies). (Id. 154-58). Dr. Woodworth also served as the Director of Iowa's Statistical Consulting Center, advising researchers on appropriate statistical techniques for over eighty empirical studies. (Id. 1203-04). He has published widely in statistical journals (see GW 1, at 2-3), and is a member of the Committee on Law and Justice Statistics of the American Statistical Association. (Id. 1194).24/

23/ Baldus also served as a consultant on capital sentencing review to two state supreme courts (id. 94-96) and was at the time of the 1983 hearing a principal consultant to a Task Force of the National Center for State Courts, charged with developing appellate capital sentencing methods and standards. (Id. 97-100). In light of his extensive experience, the District Court's finding that "[b]efore he became involved in projects akin to that under analyses here, Baldus apparently had had little contact with the criminal justice system," is clearly erroneous.

24/ The District Court qualified Professor Woodworth in the "theory and application of statistics, and in the statistical ... analysis of discre[te] outcome data," (id. 1206).

(ii) Petitioner's Data-Gathering Effort Was Carefully Conducted

Petitioner's experts testified that they undertook two overlapping studies of the administration of Georgia's capital sentencing system in the post-Furman era. The first of these, entitled the Procedural Reform Study ("PRS"), was designed to examine whether disparities in treatment, based upon race, could be found at two key "decision points" in the Georgia system: the prosecutor's decision, following a murder conviction, on whether to proceed to a penalty trial, where a death sentence might be imposed, or to accept the automatic life sentence that follows any murder conviction under Georgia law; and the jury's decision, in those cases advancing to a penalty trial, on life imprisonment or death. (Id. 166-67).25/ The universe for the PRS was defined to include all defendants arrested between the enactment of Georgia's post-Furman capital statute on March 28, 1973 and June 30, 1978, who were subsequently convicted of murder - some 594 individuals. (Id. 170-71; 192).

The second study, designated the Charging and Sentencing Study ("CSS"), was designed to examine possible racial discrimination at all decision points from indictment forward, including prosecutorial plea bargaining decisions, jury decisions on conviction or acquittal, and the sentencing decisions encompassed in the PRS. (Id. 261). The CSS was framed to include a sample of persons indicted for both murder and for voluntary manslaughter

25/ For a description of the statutory options available under Georgia law upon conviction for murder, see Gregg v. Georgia, supra, 428 U.S. at 162-66.

during the entire period from 1973 through 1978. (Id. 263-64).26/

The data-gathering procedures have been summarized elsewhere. (See Spencer 1st Br., App. A 11-13, 17-23). We will here confine our attention to four aspects of that process: (a) the integrity of the data sources; (b) the strengths of the data-gathering instruments employed; (c) the care and accuracy of the coding process; and the (d) coding conventions employed.

(a) The Integrity of the Data Sources

Professor Baldus testified that, in choosing a state for study, he and his colleagues "were very much concerned about the availability of data." (Id. 160). Baldus dispatched a colleague "to Georgia for a period of two weeks to find out what data were here that we could get access to, and he returned to Iowa with a glowing report about the many sources of data." (Id. 174-75). These included not only the records of the Supreme Court of Georgia -- which typically contained trial transcripts, trial judges' reports, appellate briefs, and a summary card on each case (id. 175; 202-04; see, e.g., DB 29-33) -- but also background information on each defendant in the files of the Department of Offender Rehabilitation (id. 175; 204-05) and victim information from the Bureau of Vital Statistics (id. 176; 205-06; see, e.g. DB 47).

26/ The PRS does not involve a sample; instead it includes every individual within the universe. The CSS, by contrast, embraces a universe of 2484 from which a weighted sample of 1066 cases was drawn by scientifically appropriate procedures. (Id. 265-73).

Most importantly, Baldus and his colleagues eventually located "an extensive file of information on all offenders" in the Board of Pardons and Paroles (id. 176), which became the basic source for the Charging and Sentencing Study.

The official Pardons and Parole files, petitioner demonstrated to the District Court, are kept pursuant to a stringent state statute that requires the Board "to obtain and place in its permanent records as complete information as may be practically available on every person who may become subject to any relief which may be within the power of the Board to grant ... [including] A. A complete statement of the crime for which such person is sentenced, [and] the circumstances of such crime ... E. Copy of pre-sentence investigation and previous court record ... [and] H. Any social, physical, mental or criminal records of such person." (Former GA. CODE. ANN. § 77-512). L.W. Warr, a former field officer for the Board, now a field supervisor (Fed. Hab. Tr. 1327), testified that field officers (all of whom are required to be college graduates) (id. 1329), are trained to "check local criminal records ... go to the clerk of court, get sentence information, indictments, jail time affidavits, we get police reports from the agency that handled the case." (Id. 1330-31).27/

27/ The District Court noted that "the police reports were missing in 75% of the cases [and] the coders treated the Parole Board summary as a police report" (R. 1161; see 1157). Officer Warr testified, however, that whenever the actual police reports were not included in Parole Board files, they were always summarized, and nothing "contained in the police reports ... would [be] routinely omit[ted]" (Fed. Hab. Tr. 1332; accord, id. 1337). Furthermore, Warr stated that, especially in homicide cases, field officers often went beyond the report to "interview the [police] officers that were involved in the case" (id. 1332). For this reason, the Pardon Board summaries were typically superior sources of information to the actual police reports themselves.

In homicide cases, moreover, Parole Board officers routinely speak, not only with the investigating police officers (Id. 1332), but also with the District Attorney to obtain "his comments concerning the case" and "his impression regarding what happened ... involving the particular crime." (Id. 1333). The officers were guided in their investigation by a Field Operations Manual (LW 1), which contained the following instructions, among others:

> "3.02 ... The importance of this report cannot be over-emphasized; and where the offender has been convicted of crimes against the person, it is imperative that the Officer extract the exact circumstances surrounding the offense. Any aggravating or mitigating circumstances must be included in the report.
>
> • • •
>
> "3.02 ... Circumstances of the offense - This should be obtained in narrative form, it should be taken from the indictment, the District Attorney's Office, the arresting officers, witnesses, and victim. A word picture, telling what happened, when, where, how and to whom should be prepared."
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> • • •
>
> The Parole Officer should be as thorough as possible when conducting post-sentences on persons who have received ... sentences in excess of fifteen years. In cases where arrest reports are incomplete the circumstances of the offenses should be obtained as thoroughly as possible and the Parole Officer should review the transcript of the trial if available for detailed information. A personal interview with the arresting or investigating officer is almost always a valuable source of information as the officer may recall important details and facts which were not revealed in the arrest report."

(Id., 2-4). The State offered no testimony to suggest that these standards were not regularly followed, or that the official

Parole Board record contained any systematic errors or omissions (Id. 648: "we're not in a position at this point to challenge the underlying data source ... from the Pardons and Paroles Board") -- much less any information that these files were systematically biased according to the race of the defendant or the victim.28/

Baldus acknowledged that some data were occasionally missing from the Pardons and Paroles files, as well as from the files of other agencies -- the Georgia Supreme Court, the Department of Offender Rehabilitation, and the Bureau of Vital Statistics -- to which he also turned. (Id. 205-06). The only important categories of missing data, however, involved information on the race of the victim, on whether a penalty trial had occurred, and on whether a plea bargain had been offered. (Id. 586-88).29/ Baldus took extraordinary steps to obtain this information from official files, even writing systematically to defense counsel and prosecutors to secure it where official sources failed. (Id. 587-88; see DB 45, 46). Moreover, petitioner sought without success to secure

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28/ In light of this uncontradicted testimony, the District Court's findings that "[t]he information available to the coders from the Parole Board Files was very summary," (R. 1160), and that "[t]he Parole Board summaries themselves were brief" or "incomplet[e]" (Id.), are at least misleading, if not clearly erroneous.

29/ Despite extensive testimony explaining the rationale under which the coders were instructed to code certain information as "U" or "unknown" in Baldus' questionnaires (see id. 444-45, 524-27, 1664-90), and further testimony on the scientific appropriateness of Baldus' use of the "U" code (id. 1761-64), the District Court suggests throughout its opinion that this accepted coding convention represents "missing data" (R. 1163-67). We deal with the "U" coding issue and its actual effect on Baldus' analyses at pages 41-44.

these data from respondent during the discovery process. (R. 556; 595-96; 599; 615).

In the end, the amount of missing data proved scientifically insignificant. Only 5 of the 594 cases in the PRS lacked race-of-victim information (id. 1096; 1705-06); for the CSS, the number was 63 of 1066 (id.). Penalty trial information was missing in only 23 of the 594 for the PRS (id. 1104), in an estimated 20 to 30 of 1066 cases in the CSS. (Id. 1119-21). Plea bargaining information -- information not on record facts about whether bargains were accepted and pleas entered, but rather more informal information on whether pleas had been unsuccessfully sought or offered (id. 1152-53) -- was obtained for sixty percent of the cases. (Id. 1153). As petitioner's expert noted (id. 1765-66; see Fed. Oct. Tr. 82) and as commentators have agreed, missing data at a rate of 10 to 12 percent normally does not produce any systematic bias in ultimate outcomes, see, e.g. Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224, 257 (N.D. Tex. 1980), vacated on other grounds, 723 F.2d 1195 (5th Cir. 1984).30/

(c) The Quality of the Data-Gathering Instrument

During the data collection effort for the PRS and the CSS, Baldus and his colleagues developed and employed three separate questionnaires -- two for the PRS, and a third, modified and improved instrument for the CSS. The initial PRS "Supreme Court

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30/ To confirm those theoretical judgments Baldus testified that he performed a wide range of alternative analyses, including those specifically recommended as appropriate by respondent's experts (id. 1501), precisely in order to see whether these missing data might have affected the persistent racial disparities that he found. (Id. 1101; 1694-1708). None did.

Questionnaire" (see DB 27), 120 pages in length, was devised through a lengthy drafting process. "We sought to identify," Baldus testified, "any variable that we believed would bear on [the] matter of the death worthiness of an individual offender's case ... relating to the nature of the crime, the personal characteristics of offender, characteristics of the victim." (Id. 194-95).

The initial Supreme Court Questionnaire proved of unwieldy length for use in the field. (Id. 208). Therefore, although 330 cases in the PRS study were eventually coded using this instrument (id. 200; see DB 28, at 2), Baldus developed a revised version, designated the "Procedural Reform Questionnaire" (see DB 35). The Supreme Court Questionnaire was actually coded in Iowa, by coders who employed copies of original court documents obtained from official Georgia files (see, e.g., DB 29-33), as well from detailed abstracts of the files and a written case summary provided on each case by Baldus' Georgia coders. (See DB 33; Fed. Hab. Tr. 208-15). However, the 351 Procedural Reform Questionnaires were all filled out in Georgia, in the offices of the public agencies involved, with "the source document literally at [their] fingertips when [they] did the coding." (Id. 366).

One major feature of both PRS questionnaires (as well as the CSS questionnaire) was their inclusion of a "narrative summary" section, in which the coders could register important information that was not otherwise covered in the questionnaire. As Professor Baldus explained, "[w]e had no illusion that our questionnaire could capture every nuance of every case. But we wanted to be able to record that somehow. So we entered that

information on these ... summaries." (Id.).31/ Baldus also created an "other" category for certain questions to permit a coder to include unforeseen but possibly relevant information.32/

Despite the comprehensiveness of the PRS instruments, the CSS questionnaire (see DB 38) marked a substantial improvement in several respects. First, Baldus included a number of variables to capture the strength of the evidence. (Fed. Hab. Tr. 274-75). Second, he added additional variables on legitimate aggravating and mitigating factors. (Id. 274). Third, Baldus virtually abandoned the "foil entry" format employed in the PRS questionnaires, under which a coder could occasionally find too few foils on which to enter relevant data in response to particular questions. (Id.).33/

31/ The District Court apparently misconceived Baldus' testimony concerning these summary documents, stating that "an important limitation placed on the data base was the fact that the questionnaire could not capture every nuance of every case. R. 239" (R. 1159). In fact, the summaries were included precisely to permit Baldus to capture such nuances.

32/ The District Court also treated this "other" coding feature as if it were a deficiency in the questionnaire design, not an asset. (R. 1168). In fact, it permitted Baldus to capture additional information and determine whether some unforeseen factor may have had a systematic impact on his analyses. (Id. 1708-09). Baldus re-analyzed the "other" response in some of his alternative statistical analyses, finding that their inclusion "had no effect whatever. It in no way diminished the racial effects. In fact, it intensified them slightly." (Id. 1710).

33/ The District Court faulted the questionnaires for their use of the foil method (R. 1159-60), without making clear that this method was largely a feature of the PRS study -- which played only a minor role in Baldus' analyses. Almost all of the major analyses were conducted on the CSS data. (Id. 1437). Even so, as a check on the impact of the foils, Baldus identified some 50 PRS cases in which there was "overflow information ... that wouldn't fit into the original foils," recoded all of the important variables from the PRS in which the foil method had been employed, re-ran his analyses and "found that the results were identical, and in fact, the race effects became somewhat intensified when this additional information was included." (Id. 1099-1100). A recoding of the only two items on the CSS questionnaire that had retained the foil method obtained identical results. (Id. 1101).

The State's principal expert conceded that the CSS instrument was "an improved questionnaire." (Id. 1392); indeed, respondent never proposed or identified any variables or set of variables, not included in the analyses, that might have eliminated the racial disparities reported by Baldus. (Id. 1609).

(c) The Care Employed in Coding

The coding process for both studies employed "state-of-the-art" procedures designed to ensure uniform, accurate collection of data. Initial coding for the PRS study was overseen by a law graduate (id. 207-05) who developed with Baldus a written "protocol," a series of careful instructions to coders meant to achieve consistent treatment of issues by regularizing coding practices. (Id. 227-28; see DB 34).

To complete the questionnaire for the CSS study, Baldus employed as his supervisor Edward Gates, one of the two coders who had earlier worked on the PRS study. (Id.). He recruited five coders in a nationwide law school search (id. 301); Baldus flew to Georgia for a week in June of 1981 to train the students, explain the extensive written protocol 34/(id. 310-11); see DB 43) and code practice questionnaires with th m. (Id. 309). Throughout the summer, Baldus maintained daily telephone contacts wit Gates and the coders to resolve any issues presented by the coding. (Id. 400).

The State's expert purported to test the coders' accuracy, not by checking questionnaires obtained through discovery

34/ The written protocol, as this Court can observe from even a quick review (see DB 43), involved hundreds of instructions on both general coding issues and specific issues for particular questions. The District Court's statement that "the coders were given two general rules to resolve ambiguities of fact," (R. 1157), hardly does justice to the care taken in providing guidance to the coders.

against files in the State's possession, but by running computer comparisons on those cases included in both the PRS and CSS studies. This computer check generated a list of ostensible "mismatches," which the State implied were indicative of multiple coding errors. The District Court apparently credited this argument. (R. 1162).

The State's expert admitted, however, that in compiling "mismatches" he had made no attempt to compare the coding instructions from the PRS and CSS protocols, to see whether in fact coders had been following identical rules. (Id. 1447). In fact, as Baldus and Gates both testified, instructions for coding items in the two studies were often quite different. As a general example, in the PRS, coders were required to draw reasonable inferences from the file (id. 367); in the CSS, they were not. (Id.). By way of further example, protocols for the coding of the (b)(3), (b)(7) and (b)(10) aggravating circumstances were very different in the PRS and CSS studies. In short, as the State was forced to concede, "I don't believe Dr. Katz is indicating either one is necessarily right or wrong in his judgment. He's just indicating he's done a computer count and found these inconsistencies." (Id. 1444).

Professor Baldus testified on rebuttal that he had performed an extensive analysis of the State's alleged mismatches, employing the official file materials and the narrative summaries, to determine whether the inconsistencies represented coding errors, rather than differences in PRS and CSS coding instructions or differences due to data sources relied upon. (Id. 1718-19). (Many of the PRS cases were coded from Georgia Supreme Court materials,

whereas all of the CSS cases were coded from the Pardons and Paroles Board files). Baldus reported that "the average mismatch rate was 6 percent, of which one percent ... were attributable to either a coding error or a keypunching error or data entry error of one sort or another." (Id. at 1719). Baldus added

> "that translates into an error rate of approximately one-half of one percent in each of the two studies. However, we found on further examination that ... the error rate in the Procedural Reform Study was higher than it was in the Charging and Sentencing Study.

(Id. 1719-20). Since the CSS study was the basis for most of Baldus' analyses (id. 1437), it appears that the actual error rate was extremely low.[35/]

(d) The Basic Coding Conventions

The State vigorously attacked one coding convention relied on by Baldus and his colleagues throughout the PRS and CSS studies: the use of a "U" or "unknown" code. Edward Gates explained that coders were instructed to enter a "1" if a fact were "expressly stated in the file" (id. 444), a "2" if the fact were "suggested by the file but not specifically indicated", (id. 444-45), a blank if the fact were inconsistent with the file, and a "U" if

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35/ The District Court noted that there were inconsistencies between the coding of "several variables" for petitioner McCleskey and his co-defendants (R. 1161). The Court's only reference is to testimony indicating that in the PRS study, petitioner McCleskey was coded as having three special aggravating factors while co-defendant Burney is coded as having only two. Gates testified that coding provisions for co-perpetrators in the CSS study were "far superior ... in terms of precisely defining the differences between the roles that the different actors in the crime played." (Id. 471). Once again the discrepencies appear to pose no threat to Baldus' analyses, which were largely based on CSS data. Indeed, although different coders were allowed to code the cases of co-perpetrators in the PRS (id. 1110-13), for the CSS, Baldus developed the practice of having a single coder complete questionnaires on all co-perpetrators. (Id. 1124-26).

the coder could not classify the item based on the file. (Id.). As Professor Baldus explained:

> What an unknown means basically as it's coded in the Charging and Sentencing Study is that the ... information in the file, was insufficient to support an inference as to the occurrences or the non-occurrence of the event.... The idea was that if the file would not support an inference of an occurrence or non-occurrence, then we would further presume that the person who created that file or who had the information that was available in that file would be in a state of ignorance with respect to that fact.
>
> Furthermore, upon the basis of my knowledge of decision making and also on the basis of my practical experience, when people are ignorant about a fact, that fact does not become a determinant in the decision making.

(Id. 1684-85).

In sum, while the CSS instrument permitted the coders to reflect the distinction between the affirmative non-existence of a fact in the file (coded blank), and uncertainty about its possible non-existence (coded "U"), once statistical analysis began, the "U" was properly recoded as not present.

Baldus offered as an example of this logic the aggravating variable that the "victim pled for his life." If there had been witnesses present during the crime, a coder would code that variable either present or absent, depending on the witnesses' accounts. But if there were no witnesses or other evidence, Baldus reasoned there was no way to make an inference either way, and the item would be coded "U." (Id. 1685-86; see also id. 1155-58).36/

36/ The District Court's counter-example completely missed the point. Twice the Court adverted to a case in which the defendant told four other people about the murder, but in which the coder was unable to determine from the file whether the defendant had

(Continued)

This explanation casts in a radically different light the District Court's ominous-looking list of variables coded "U" in more than ten percent of the data. (R. 1163-65). Many involve either state-of-mind or relational variables that are often unknown to any outside investigator. For example, while "Defendant's Motive was Sex" may be important if known to a prosecutor or jury, if the fact can be neither eliminated nor confirmed from the evidence, Baldus' rule would be to code it "unknown," and ultimately discount its impact either way by treating it as non-existent.

The District Court appeared to challenge the basic logic of this coding treatment: "the decision to treat the "U" factors as not being present in a given case seems highly questionable ... it would seem that the more rational decision would be to treat the "U" factors as being present." (R. 1163). Yet no expert in the case -- neither petitioner's (id. 1184-90 (Baldus);

36/ (continued)

been bragging or expressing remorse. (R. 1160, 1161-62). The Court reasoned that "[a]s the witnesses to his statement were available to the prosecution and, presumably, to the jury, that information was knowable and probably known. It was not, however, captured in the study." (R. 1160).

The Court's reasoning assumes that the defendant must have either been bragging or expressing remorse, and that the prosecutor, by interviewing the four witnesses, must have ascertained which. It is equally likely, however, that the defendant told others about the murder without either bragging or expressing remorse. In that case, the file would properly reflect the contact with the witnesses, but would not reflect bragging or remorse. Under Baldus' rules the coder would code "unknown" and the bragging and remorse would ultimately be treated as not having occurred. Only if the prosecutor and jury had known of bragging or remorse, but the parole officer had somehow failed to learn of it in his review of the transcript, in his talks with the police and the District Attorney, or in his review of police files, would "U" be a misleading code.

1761-63 (Berk)), nor respondent's (id. 1503; (Katz); 1656-58 (Burford)) suggested that a "U" should be coded as "1" or "present" for purposes of analysis. Indeed, Dr. Berk, petitioner's rebuttal expert, testified that the National Academy of Science panel on sentencing had expressly considered this issue during its two-year study of sentencing research and had endorsed the very approach Baldus adopted. (Id. 1761-63). The District Court's conclusion that a contrary code should have been used is without foundation in the record.37/

(iii) The Statistical Methods Were Valid and Appropriate

Having gathered and compiled their data, Baldus and his colleagues employed a wide variety of statistical procedures to analyze it, including cross-tabular comparisons (id. 683, 701-05), unweighted least squares regressions (id. 689-700), weighted least squares regressions (id. 1222-25), logistic regressions (id. 917-18), index methods (id. 1234-36), and qualitative case comparisons, or so-called "cohort" studies, (id. 1049-59).

Baldus employed these methods on progressively more elaborate "models," or groups of variables chosen to determine whether the race-of-victim and race-of-defendant disparities could be reduced

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37/ Moreover, Baldus testified that, among a series of alternatives analyses he conducted to test the effects of his "U" coding rules (see generally Fed. Hab. Tr. 1194-1704 and DB 120-123), he recoded unknowns as "1" or "present" just as the Court had recommended. The effects on racial disparities "were within a percentage point of one another and all the co-efficients that were statistically significant in one analysis were in the other." (Id. 1701). Another alternative analysis, employing "list-wise deletion" of all cases with "U" codes, recommended by the State's principal expert, (id. 1501-02), also had no adverse effect (id. 1695-96); see DB 120); indeed it increased the race-of-victim coefficient by two percentage points.

or eliminated: Baldus explained that no single method of statistical analysis, and no single model, was invariably infallible, but that if statistical results could persist, no matter what methods were employed, a researcher could have great confidence that the "triangulated" results reflected real differences:

> It's this widespread consistency that we see in the results ... it's this triangulation approach, if you will, that provides the principal basis for our opinions that there are real racial effects operating in the Charging and Sentencing System.

(Id. 1082-83).

The District Court failed throughout to appreciate the logic of this approach. Instead, it rigidly, and petitioner submits erroneously, refused to admit "except as to show process" a series of relevant models, solely because they did not include variables the Court thought should be included. (See id. 742-46; 755; 760; 768; 771-73; 779; 981-82; 984). Indeed, the Court's approach throughout the hearing was to fault Baldus' models for failure to account for unspecified "unique" factors. (E.g., id. 925; Fed. Oct. Tr. 92).[38/] The Court reasoned -- contrary to the expert testimony of Baldus (Fed. Hab. Tr. 808-19); Woodworth (Fed. Oct. Tr. 55); and the State's expert Dr. Burford (id. 1673)

38/ The Court also overlooked in its opinion that, at the invitation of petitioner's experts, it was able to test its own "Lawyer's Model," constructed by the District Court during the August 1983 hearing to reflect those factors it believed to be most likely to predict the sentencing outcome. (Id. 810; 1426; 1475-76; 1800-03; see C-1). Baldus' subsequent analyses employing the Court's own model showed sharp differences in sentencing outcomes by racial category. (R., 735, 736). Strong and statistically significant race-of-victim effects were reflected upon regression analysis, whether employing the least squares (R. 738) or the logistic approach (R. 739), and Baldus averred that these analyses further reinforced his earlier testimony. (See generally R. 731-752).

-- that since Baldus testified that he had identified 230 variables that might be expected to predict who would receive death sentences, "it follows that any model which does not include the 230 variables may very possibly not present a whole picture." (R. 1171). If respondent had demonstrated that petitioner's racial disparities only appeared in smaller models, but disappeared or were substantially reduced whenever 230-variable analyses were conducted, the District Court's position would rest on logic and precedent. Since, however, as we will demonstrate below, the race-of-victim disparities continue to show strong effects in large models as well as small, the District Court's position is without support. As a matter of fact, it is clearly erroneous; not even the State's expert advanced such a contention. As a matter of law, it has no allies. No prior case has ever intimated that only large-scale models can constitute relevant evidence in a statistical case. See, e.g., Eastland v. Tennessee Valley Authority, 704 F.2d 613, 622-23 n.14 (11th Cir. 1983).

(iv) The Results Make Out A Prima Facie Case Of Racial Discrimination

To begin his analysis, Baldus first calculated sentencing outcomes by race, unadjusted for any additional variables or background factors.39/ The pattern he found (DB 63) revealed marked racial disparities:40/

39/ Each of these analyses was conducted on the CSS data, unless otherwise noted.

40/ These results closely parallel earlier Georgia findings. Bowers & Pierce, "Arbitrariness and Discrimination under Post-Furman Capital Statutes," 26 CRIMF & DELINQ. 563, 599 (1980).

Black Defendant/ White Victim	White Defendant/ White Victim	Black Defendant/ Black Victim	White Defendant/ Black Victim
.22 (50/228)	.08 (58/745)	.01 (18/1428)	.03 (2/64)

(Id. 730-31). However, Baldus made it clear that "[t]his table merely generates an hypothesis ... it has no controls. There are many rival hypotheses that could explain these relationships." (Id. 731).

Baldus thus began a series of analyses, steadily adding background variables to his multiple regression analyses, thereby "controlling for" or holding constant the effect of those factors, to see if an independent racial effect would persist. Baldus found strong racial effects when he controlled for all of Georgia's statutory aggravating circumstances (DB 78) and in addition, for 75 mitigating factors (DB 79). In DB 80, Baldus presented an important table which compared the racial effects in several, increasingly complex models. Excerpts from that table reveal the following:

	Before Adjustment for any Background Factors	After Adjustment for the Other Variable Racial	After further Simultaneous Controls for Nine Background Variables	After Simultaneous Control for 230 + Non Racial Factors
Race of Victim	.10 (.0001)	.17 (.0001)	.07 (.001)	.06 (.01)
Race of Defendant	-.03 (.03)	.10 (.001)	.04 (.10)	.06 (.01)

Baldus noted that while the coefficients[41] for race-of-victim declined somewhat as additional background variables were added

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41/ Professor Baldus testified that a regression coefficient is a summary figure that provides the average disparity, with

(Continued)

to the analysis, and that while the measures of statistical significance also declined,42/ both figures remained significant. Baldus explained that it is "quite unusual to see an event like that," since so many of the 230 variables were themselves correlated with both the race of the victim and the sentencing outcome, a fact that could be statistically expected to suppress the magnitude of the racial variable. (Id. 804).

To examine the relative power of the race-of-victim and race-of-defendant variables in sentencing decisions, Baldus compared them with other important sentencing variables, rank-ordered by their coefficients (DB 81, 82). The impact of the race-of-victim variable proved of the same order of magnitude as major aggravating factors such as whether the defendant had a prior record of murder, or whether the defendant was the prime mover in the crime (id. 812-15).

Baldus then continued his analyses, looking at other models that might eliminate the racial effects. Petitioner's Exhibit DB 83 includes a variety of such models, some employing all 230 of Baldus' recoded variables. All of these models show

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41/ continued

and without the presence of a variable, across all the cases. (Id. 690-94). A coefficient of .06 for a variable means that the presence of that variable, after controlling for all other factors in the model, would increase the outcome of interest (here, a death sentence) by an average of six percentage points. (Id. 692-93).

42/ Statistical significance, Baldus explained, is a measure of the likelihood that if, in the universe of cases as a whole, there are in fact no disparities, one could have obtained disparate results merely by chance. (Id. 712-15). Normally expressed in "p" values, a figure of .01 means the likelihood that the coefficient is merely a chance finding is 1-in-100; a figure of .0001 would mean 1-in-10,000.

strong race-of-victim and race-of-defendant effects.43/

I. W.L.S. REGRESSION RESULTS

A	B	C
	Coefficients and Level of Statistical Significance	
Non-Racial Variables in The Analysis	Race of Victim	Race of Defendant
a) 230 + aggravating, mitigating, evidentiary and suspect factors	.06 (.02)	.06 (.02)
b) Statutory aggravating circumstances and 126 factors derived from the entire file by a factor analysis	.07 (.01)	.06 (.01)
c) 44 non-racial variables with a statistically significant relationship (P<.10) to death sentencing	.07 (.0002)	.06 (.0004)
d) 14 legitimate, non-arbitrary and statistically (P<.10) significant factors screened with W.L.S. regression procedures	.06 (.001)	.06 (.001)
e) 13 legitimate, non-arbitrary and statistically significant (P<.10) factors screened with logistic regression procedures	.06 (.001)	.05 (.02)

Baldus adopted yet a different approach to analyze precisely where in the system the racial effects were having their impact. Employing a recognized social science technique,

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43/ In light of DB 81 and DB 83, as well as DB 102 and DB 105, the District Court was clearly erroneous in asserting that "[t]he best models which Baldus was able to devise which account to any significant degree for the major non-racial variables, including strength of the evidence, produce no statistically significant evidence that race plays a part in either of those decisions in the State of Georgia." (R. 1187).

the "index method," (see id. 877, 1234-36) he sorted the cases into roughly equal groups based upon their predicted likelihood of receiving a death sentence (id. 877-79); he then analyzed racial disparities within those groups, which included increasingly more aggravated cases. (See DB 89). Noting that the likelihood of a death sentence rises dramatically in the most aggravated groups, Baldus further divided the top groups into eight subgroups for analysis. As the excerpted portion of that table (DB 90) reveals, there are clear race-of-victim differences -- especially in the middle range of cases -- which are statistically significant overall at a .01 (1-in-100) level.

A	B	C	D	E
Predicted Chance of a Death Sentence 1 (least) to 8 (highest)	Average Actual Sentencing Rate for the Cases at Each Level	Death Sentencing Rates for Black Defendant Involving: White Victim Cases	Black Victim Cases	Arithmetic Difference in Rate of the Victim Rates (Col. C- Col. D)
1	.0 (0/33)	.0 (0/9)	.0 (0/19)	.0
2	.0 (0/55)	.0 (0/8)	.0 (0/27)	.0
3	.08 (6/76)	.30 (3/10)	.11 (2/18)	.19
4	.07 (4/57)	.23 (3/13)	.0 (0/15)	.23
5	.27 (15/58)	.35 (9/26)	.17 (2/12)	.18
6	.17 (11/64)	.38 (3/8)	.05 (1/20)	.33
7	.88 (51/58)	.91 (20/22)	.75 (6/8)	.16

Baldus observed that there was little disparity in the less aggravated cases, "[b]ut once the death sentencing rate begins to rise, you'll note that it rises first in the white

victim cases. It rises there more sharply than it does in the black victim cases." (Id. 882-83).44/ Baldus testified that, in his opinion, these data supported an hypothesis first advanced by Harry Kalven and Hans Zeisel in their work, THE AMERICAN JURY 164-67 (1966),

> "what they call the liberation hypothesis and in short what it was, that the exercise of discretion is concentrated in the area where there's real room for choice.
>
> [W]hen you look at the cases in ... the midrange, where the facts do not call clearly for one choice or another, that's where you see there's room for exercise of discretion ... the facts liberate the decision maker to have a broader freedom for the exercise of discretion, and it is in the context of arbitrary decisions that you see the effects of arbitrary or possibly impermissible factors working.

(Id. 844)

Baldus and Woodworth marshalled a substantial body of evidence in support of this liberation hypothesis during the evidentiary hearing. The most striking illustration was the figure constructed by Woodworth to illustrate the differential rates at which the likelihood of receiving a death sentence rises in Georgia for black victim and white victim cases, given similar levels of aggravation. Woodworth noted that, according to this graph, petitioner Warren McCleskey's level of aggravation "place[s] him in a class of defendants where there is roughly a

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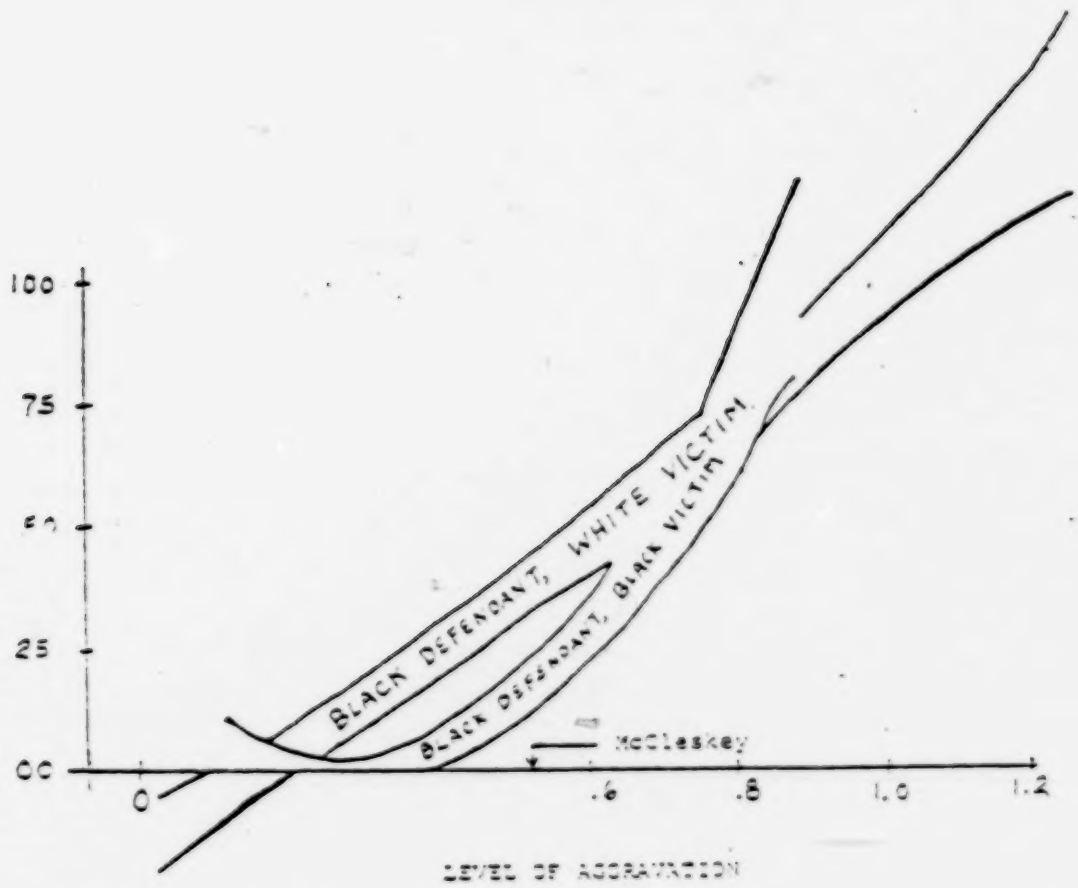
44/ The District Court apparently misunderstood those tables. It noted, as if the fact were contrary to Baldus' testimony, that DB 89 reports "higher racial disparities in the most aggravated level of cases," (emphasis added). It also discounted the results in DB 90 because, unlike DB 89, it was purportedly not "predicated on a multiple regression analysis." (R. 1205). In fact, the liberation hypothesis predicts that disparities would exist only at the higher levels of DB 89, a table that includes all cases -- most of them very unaggravated. It is only in DB 90, which comprises the subset of cases in which the risk of a death sentence becomes significant, that the disparities in the middle range appear. (Fed. Hab. Tr. 882-83) Like DB 89, moreover, DB 90 was built by employing regression analysis; the Court's surmise to the contrary is clearly erroneous.

GWB

Figure 2: Midrange[a/] Model With Interactions and Nonlinearities--Black Defendants



a/ The curves represent 95% confidence bounds on the average death sentencing rate at increasing levels of aggravation (redrawn for computer output).

twenty percentage point of greater disparity between black victim cases [and] ... white victim cases." (Id. 1734-35).

[See GW 8]

Baldus performed a wide variety of further analyses which we cannot fully review within the confines of this brief. A few, however, require additional attention. The District Court, unguided by experts for either petitioner or respondent, suggested that DB 95 was "perhaps the most significant table in the Baldus study," since it "measures the race of the victim and the race of the defendant effect in the prosecutorial decision to seek the death sentence and the jury decision to impose the death sentence." (R. 1185). The Court noted that "[t]he coefficients produced by the 230-variable model on the Charging and Sentencing Study data base [in DB 95] produce no statistically significant race of the victim effect either in the prosecutor's decision ... or in the jury sentencing decision." (R. 1186).

The Court's statement in a literal sense is accurate. It disregards, however, that the CSS figure, P=.06, is in fact marginally significant; that the equivalent PRS model does produce a statistically significant result;45/ that the smaller model results were highly significant; 46/ and that an analysis

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45/ The Court discounted this figure as "totally invalid for [the PRS Model] contains no variable for strength of the evidence." (R. 1185). In so doing, it ignored Baldus' obvious point that strength of the evidence was substantially controlled for in the PRS, since the universe was limited by definition to cases in which a conviction -- presumably based on evidence sufficient beyond a reasonable doubt -- had been obtained. (Fed. Hab. Tr. 124-25).

46/ The Court stated that it "knows of no statistical convention which would permit a researcher arbitrarily to exclude factors on the basis of artificial criteria." (R. 1186). Baldus in fact testified without contradiction that such a procedure is commonly used in statistical analyses. (The State's principal expert employed a variant of it throughout his testimony.) (See, e.g., Resp. Ex. 26, 43, 45, 50).

of the combined effect of the prosecutorial and jury decision (see DB 98) showed a series of highly statistically significant race-of-victim effects. In truth, what the Court has done is to identify one of the very few large model coefficients for the race-of-victim variable in either study that is not statistically significant, brand it as a key figure, and then disparage all collateral evidence that places it in context. Such an approach to petitioner's comprehensive statistical evidence constitutes a legally insufficient basis to reject petitioner's persistent racial findings.47/

THe second series of analyses that require comment are those directed toward Fulton County (where petitioner was tried) and toward petitioner's own case. Baldus conducted both quantitative and qualitative studies of death sentencing rates in Fulton County which were reflected in DB 106 through DB 116.48/ Baldus testified that a repetition in Fulton County of the progressively more elaborate analyses he had conducted statewide "showed a clear pattern of race-of-victim disparties in death sentencing rates among the cases which our analyses suggested were death eligible." (Id. 983). Regression analyses at succes-

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47/ The District Court also chose to impugn the integrity of petitioner or his experts in discussing this exhibit, noting that "we are given no outcomes based on the larger scaled regression," although the Court "does not understand that the analysis was impossible, but instead ... that because of the small numbers the result produced may not have been statistically significant." (R. 1187). The Court is wrong; such analyses employing these small numbers are statistically inappropriate. See e.g., Halinski and Feldt, "The Selection of Variables in Multiple Regression Analysis," 7 J. EDUC. MEASUREMENT, 151 (1970). We note, morever, that both in this table and elsewhere, petitioner and his experts regularly reported non-significant findings even when statistical procedures could be appropriately conducted upon them.

48/ The District Court refused to admit DB 106 (id. 979), DB 107 (id. 981-92), and DB 108 (id. 984), holding that because they did not sufficiently control for background variables they were irrelevant. This holding is legally erroneous.

sive stages in the charging and sentencing process revealed highly significant racial disparities at two points: the prosecutor's plea bargaining decision and the prosecutor's decision to advance a case to the penalty phase. (Id. 1038-39). While Baldus necessarily tempered his evaluation of these results because of the small size of the universe, (id. 1040-43), he noted that "these coefficients are very large, it's not as if we're dealing with small coefficients, these are substantial. So that leads me to believe that what you're seeing is evidence of a real effect." (Id. 1044).

To supplement this statistical picture, Baldus conducted two cohort studies, one of the "near neighbors" cases, those which scored most like petitioner McCleskey in an overvall "aggravation index." (Id. 986-91). Having identified 32 near neighbors, Baldus sorted them into typical, more aggravated, and less aggravated groups. (Id. 991). Computing death sentencing rates by race of victim and race of defendant, Baldus found significant disparities; in McCleskey's group, the disparity was .40. (Id. 993).

In a second cohort study Baldus examined 17 defendants involved in the homicides of police officers. Two among the seventeen, including petitioner McCleskey, went to a penalty trial. The other defendant, whose police victim was black, received a life sentence. (Id. 1050-62; DB 116). Petitioner's sentence was, of course, death. "[T]he principal conclusion that one is left with," Baldus testified, "is that ... this death sentence that was imposed in McCleskey's case is not consistent with the disposition of cases involving police officer victims in this county." (See also 1085-86).

Finally, Dr. George Woodworth, petitioner's expert statistician, testified concerning the likely impact of the

racial variables on a case at petitioner McCleskey's level of aggravation. Woodworth noted that, using his exhibit GW-8, he had computed the race-of-victim disparity at petitioner's level of aggravation to be 22 percentage points. (Id. 1738). He then turned to DB 90 and observed an 18 percentage point disparity by race at petitioner's level. (Id. 1739). Calculated by use of an unweighted logistic regression, the racial disparity was 23 percent. (Id. 1740). Woodworth concluded:

> So it would seem that at Mr. McCleskey's level of aggravation the average white victim case has approximately a twenty percentage point higher risk of receiving the death sentence than a similarly situated black victim case.

(Id. 1740).49/

Petitioner's final expert was Dr. Richard Berk, a highly qualified social scientist (see RB 1) and a frequent consultant on criminal justice matters to the United States Department of Justice. (Id. 1753). Berk in fact had served on a distinguished National Academy of Sciences panel charged with reviewing all previous research on criminal sentencing issues in order to set standards for the conduct of such research. (Id. 1761-62). After reviewing Baldus' studies,

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49/ Beyond this statistical and qualitative evidence on cases like petitioner's, petitioner introduced the deposition of District Attorney Lewis Slayton. (Id. 1319). In that deposition, Slayton acknowledged that his office has no express written or unwritten policies or guidelines to govern the disposition of homicide cases at the indictment stage (Dep., 10-12), the plea stage, (Dep. at 26) or the penalty stage (Dep., 31, 41, 58-59). Moreover, murder cases in his office are assigned at different stages to one of a dozen or more assistant district attorneys (Dep., 15, 45-48), and there is no one person who invariably reviews all decisions on homicide dispositions. (Dep., 12-14, 20-22, 28, 34-38). Slayton confessed that his office does not always seek a sentencing trial in a capital case, even when statutory aggravating circumstances are present (Dep., 38-39). Slayton testified further that the decisionmaking process in his office for seeking a death sentence is "probably ... the same" as it was in the pre-Furman period. (Dep., 59-61).

analyzing the data, and reviewing Baldus' preliminary report, Berk's opinion on Baldus' study, especially its findings on race, was virtually unqualified:

> This has very high credibility, especially compared to the studies that [The National Academy of Science panel] ... reviewed. We reviewed hundreds of studies on sentencing over this two-year period, and there's no doubt that at this moment, this is far and away the most complete and thorough analysis of sentencing that's been done. I mean there's nothing even close.

(Id. 1766.)

Berk's conclusion is fully warranted. The data was reliable and carefully compiled. The regression analyses relied upon by petitioner were properly conducted by leading experts in the field. These analyses were carefully monitored for possible statistical problems, and they have been found to be both statistically appropriate and accurate in their assessment of the presence and magnitude of racial disparities in capital sentencing in Georgia. These disparities are real and persistent; they establish petitioner's prima facie case.

C. The Law: The District Court Misapplied the Law In Rejecting Petitioner's Prima Facie Case

We have already pointed out many instances in which the District Court misread the record, overlooked testimony, or made findings contrary to the evidence presented by both parties -- petitioner and respondent alike. Yet the principal errors committed by the District Court on this record stem from its apparent misunderstanding of statistical proof, and its misapplication of controlling legal authority. In effect, the District Court created for itself a roster of new legal standards and principles to judge the quality of petitioner's data, the admissibility of his exhibits, the appropriateness of his models, and even the usefulness of